**J. O. Mory, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 305 *and* Sheet Metal Workers' International Association, Local Union No. 20 a/w Sheet Metal Workers' International Association, AFL–CIO.** Cases 25–CA–23625, 25–CA–24410, and 25–CA–24805–1

August 27, 1998

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

The issue presented to the Board in this case is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for employment or to hire seven applicants because of their apparent intention to organize the Respondent's employees on behalf of the International Brotherhood of Electrical Workers, Local Union No. 305 (IBEW).[1] The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order. Specifically, we reverse the judge and find that the General Counsel has failed to prove that the Respondent refused to consider or hire any job applicants for antiunion reasons.[4]

The Respondent has operated as a general construction contractor for over 100 years. Its employees have never been represented by a union. It receives an average of 150–200 applications annually. Its officials interview about 20–25 percent of those applicants.

At the time relevant to this proceeding, Tamra Hunt was the Respondent's personnel director. Her duties included reviewing the applications, assessing job availability, and deciding whether the applicant should be interviewed. Hunt credibly testified about several criteria that she used in reviewing applications. One factor was a comparison of the Respondent's wages with the past or desired wages of the applicant. Hunt explained that it was the Respondent's "common practice" not to hire, at entry level positions, applicants who were currently earning more than the Respondent was paying. She said that this policy reflected the Respondent's concern about the applicant's interest in staying with the Respondent for more than a temporary period.

In July and August 1994, seven IBEW electricians (the remaining alleged discriminatees in this case) filed job applications with the Respondent. The manner of application and/or information on the applications clearly conveyed to the Respondent both the union affiliation of these applicants and their intent to organize the Respondent's employees. Indeed, union organizer Michael Closson hand-delivered a batch of these applications, including his own, and also submitted a business card disclosing his status as IBEW business representative. IBEW Business Agent Harold Wasson likewise submitted both his application and a business card to the Respondent. The Respondent did not interview or hire any of these applicants for available jobs during the period from July 1994 to November 1996. It did attempt to hire 6 of 13 known union members who applied for work during the summer of 1994.

Hunt indicated that the wage comparison factor was critical to her determination not to interview or hire any of the seven IBEW applicants. There is uncontroverted evidence that the Respondent relied on this same wage criterion during this time period to reject five other applicants, none of whom were known to be affiliated with a union or with an organizational effort. On the other hand, one of those union members whom the Respondent attempted to hire was IBEW electrician Phillip Dirig. He applied for work on July 18, 1994. His application indicated that his present and past earnings at union scale were substantially higher than the Respondent's wages. Hunt contacted Dirig with the apparent intent to hire him, but he told her that he was already working.

In October 1995, six members of the Sheet Metal Workers Union responded to the Respondent' newspaper advertisements by appearing as a group to apply for jobs. All six applicants wore union insignia. Paid union organizer John Kereszturi led the group and gave the Respondent's receptionist a business card disclosing his organizer status. The Respondent, through Hunt, hired Kereszturi a year later. She twice attempted unsuccessfully to hire one other applicant (James Till), interviewed but did not hire another (John Tafelski), attempted unsuccessfully to arrange interviews with two other applicants (Terry Anspaugh and Michael Starnes), and never contacted Kelly Ullery, the sixth member of the Sheet Metal Workers who applied in October 1995.

The General Counsel argued before the judge that the Respondent unlawfully refused to consider or hire both the IBEW and Sheet Metal Workers applicant groups because of their intent to organize the Respondent's em-

[1] On July 17, 1997, Administrative Law Judge Earl E. Shamwell, Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has requested oral argument. The Respondent's request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] There are no exceptions to the judge's finding that the Respondent did not discriminate against two applicants (Langmeyer and Lepper) who were IBEW members or against seven applicants who were members of the Sheet Metal Workers Union.

ployees. The judge recommended dismissal of all allegations relating to the Sheet Metal Workers'applicants. There are no exceptions to this recommendation.

In assessing whether the General Counsel met the initial burden of proving that union animus was a motivating factor in the Respondent's refusal to consider or offer employment to the alleged IBEW discriminatees, the judge found no independent evidence of animus. He emphasized, however, the testimony of the Respondent's officials indicating that they would clearly prefer not to have unions and union contracts for its operations. Although acknowledging that such a preference "in and of itself, does not establish necessarily an antiunion animus," the judge nevertheless assumed, arguendo, that the General Counsel had met the initial evidentiary burden of proving antiunion motivation in the Respondent's treatment of the IBEW applicant group.

The judge then proceeded to evaluate the Respondent's defenses of its hiring actions. He conceded that "Respondent's employment criteria seems facially valid, and is reasonably and plausibly connected to its legitimate business or economic reasons and concerns." (There are no exceptions on this point.) Still, the judge found that the Respondent's application of the critical wage criterion to the seven alleged IBEW discriminatees was a pretext masking the intent to avoid hiring known union organizers. In making this finding, the judge relied on the Respondent's reaction to the application of IBEW electrician Phillip Dirig. Personnel Director Hunt contacted Dirig about his application even though he was making union scale wages which were substantially higher than the Respondent's wages. The Respondent did not hire Dirig because he was already employed, but the judge found that the Respondent would have hired him absent that factor. He concluded that Hunt's unexplained willingness to ignore the wage criterion when hiring someone who apparently posed no union organizational threat to the Respondent proved that the application of this criterion to the IBEW organizer group was pretextual; and, in turn, he concluded that the pretextual reason given for failing to hire or consider hiring anyone from this group warranted the inference that animus against their organizational purpose motivated the Respondent's actions.

In sum, the judge essentially found that the General Counsel has proven unlawful discrimination based on a single unexplained variance from facially valid hiring practices. We disagree. The preponderance of credible evidence here weighs heavily against any finding of pretext or of inferring that animus against a threatened union organizational effort motivated the Respondent in its rejection of the IBEW applicants. Indeed, the judge's own findings and conclusions show that: (1) Apart from the inference drawn by the judge from what we find to be a mistaken finding of pretext, there is no evidence of animus borne by the Respondent against union members or union organizers. As the judge himself acknowledged, the strong preference of the Respondent's officials that its operation remain nonunion is not, standing alone, sufficient evidence of animus. (2) The Respondent interviewed, hired, or attempted to hire known union members during the period at issue here. (3) The Respondent interviewed, hired, or attempted to hire known Sheet Metal Workers' organizers whose wage history apparently posed no bar to their consideration under the Hunt's hiring criteria. There is no record basis for distinguishing between the organizational "threat" posed to the Respondent's operations by Sheet Metal Workers in 1995 and the organizational "threat" posed by IBEW in 1994. (4) The Respondent relied on the wage comparison criterion in declining to consider or hire several persons who applied during the same time period as the IBEW group but were not known by the Respondent to be union organizers.

Under the foregoing circumstances, we find that the single departure from normal, legitimate hiring policy—i.e., the attempt to hire IBEW member Dirig in spite of his apparently disqualifying wage history—falls short of proving disparate treatment or pretext in the application of that policy to the IBEW organizer group. We further conclude that the General Counsel has failed to meet the burden of proving that animus against union organizing motivated the Respondent's treatment of applications from the seven alleged IBEW discriminatees. We shall therefore dismiss the complaint in its entirety.

## ORDER

The complaint is dismissed.

*Steve Robles, Esq.,* for the General Counsel..

*Thomas M. Kimbrough, Esq.*, and *H. Joseph Cohen, Esq. (Barrett & McNagny),* of Fort Wayne, Indiana, for the Respondent.

*Michael L. Closson Sr.,* for Charging Party International Brotherhood of Electrical Workers, Local Union No. 305.

*John Kereszturi,* for Charging Party Sheet Metal Workers' International Association, Local Union No. 20.

## DECISION

### STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was tried before me in Kendallville, Indiana, on February 3-4, 1997, pursuant to unfair labor practice charges initially filed on December 5, 1994, by the International Brotherhood of Electrical Workers, Local Union No. 305 (IBEW), in Case 25–CA–23625 and by the Sheet Metal Workers' International Association, Local Union No. 20 (the Sheet Metal Union), in Case 25–CA–24410 on January 11, 1996, and Case 25–CA–24805–1 on July 18, 1996, against J. O. Mory, Inc. (the Company or Respondent). On July 10 and 26, 1996, the National Labor Relations Board, by the Regional Director for Region 25, issued amended complaints in Cases 25–CA–24410 and 25–CA–24805-1. On December 31, 1996, the Regional Director for Region 25 issued an order consolidating the afore-mentioned cases. At the hearing, counsel for the General Counsel (the

General Counsel or GC) moved to amend further the consolidated complaint, which amendments were granted by me with no objection from Respondent's attorney.[1] The consolidated complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully refusing to hire or consider for hire certain named applicants for employment because of their (IBEW and Sheet Metal) union membership, union activities, other concerted protected activities, and to discourage employees from engaging in these activities.

Respondent filed an answer in which it denied that it violated the Act in any way.

On the entire record in this case, including posthearing briefs filed by the General Counsel and Respondent, and on my observation of the demeanor of the witness, I make the following.

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a corporation with a principal office and place of business located in South Milford, Indiana, and various branch offices and places of business located in Fort Wayne, Avilla, Syracuse, and Angola, Indiana, and Sturgis, Michigan, has been engaged in the construction industry. Respondent admits, and I find, that for the 12-month period ending November 30, 1994, Respondent, in conducting its business operations, sold and shipped from its Indiana facilities goods and services valued in excess of $50,000 directly to points outside the State of Indiana. For the same period, Respondent, in conducting its business operations, purchased and received at its Indiana facilities goods and services valued in excess of $50,000 directly from points outside of Indiana. The Respondent further admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

### II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that at all material times the IBEW and Sheet Metal Unions have been labor organizations within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

##### 1. Respondent's business

Respondent is a general construction contractor whose operations include mechanical plumbing, electrical fire protection, engineering, sheet metal and related functions. Respondent performs commercial, industrial, and residential work. Respondent has been in operation for over 100 years and during this period has never been a "union" company. Respondent employs an average of approximately 180–250 employees at any given time. The Company performs all types of construction work.

Respondent's principal office and place of business is located in South Milford, Indiana. Most of Respondent's business is conducted in southern Indiana, but its operations extend, to a limited extent, to southwestern Michigan. Respondent employs a variety of trades in its business, including electrical, plumbing, sheet metal, mechanical welding, and heating ventilation and air-condition (HVAC) employees and related trades. These employees work in Respondent's facilities and in the field.

The principal officers and admitted supervisors and agents of the Respondent are:[2] Gene Mory, president; John Mory, secretary; Michael Rowe, vice president; Tom Knott, treasurer; Dean Polly, office manager for the Fort Wayne office; and Tamra "Tammy" Hunt, personnel director.[3]

##### 2. Respondent's hiring agent—Tamra "Tammy" Hunt

Hunt was the person principally responsible for hiring at J. O. Mory during the relevant period. Hunt's duties included the recruitment and placement of applicants for employment at the Company. She reviewed applications, determined who would or would not be interviewed, made, kept, and maintained employee files, contacted potential employees and, in general, applied and implemented the J. O. Mory hiring procedures, policies, and practices.

Hunt did not have an assigned staff or an assistant to help with the performance of her hiring duties, but consulted with other company foremen and supervisors to evaluate applications regarding positions and technical aspects beyond her ken. The receptionist at Respondent's South Milford office, however, would assist her somewhat by meeting and greeting walk-in applicants, taking their applications, and forwarding these to Hunt. Moreover, when the Company was in a particularly needful hiring mode and required employees with certain skills or even for all trades, Hunt made use of third-party referral services, billboards, and newspaper advertisements. The record is clear that as a practical matter during the relevant period, Respondent's hiring "department," as it were, was Hunt. Accordingly, the primary issue for resolution, the failure to consider to hire or hire certain alleged discriminatees, centers on her conduct and activities as Respondent's principal hiring agent, as well as her enunciated statements about what Respondent's hiring practices, policies, and procedures were, and how she applied and implemented them.

##### 3. The Respondent's hiring policies, practices, and procedures

Hunt related Respondent's hiring policies practices and procedures during the time she acted as personnel director.

J. O. Mory receives an average 150-200 applications annually. Of that number, approximately 20-25 percent are interviewed. Generally, all applications were forwarded to Hunt who determined if there was a vacancy and whether the applicant should be considered for an interview. Before any one was considered for an interview and employment, the application had to first be considered by her. Not all applicants received an interview. The process she used was described by her as a "process of elimination," with the objective being to

[1] The General Counsel amended the complaint as follows:

(1) Alleged discriminatees Richard Chandler and Harold Wasson were struck from subpar. 5(b) of said complaint; Wasson, however, remained as an alleged discriminatee in subparagraph 5(a).

(2) August 3, 1994, was added to subpar. 5(a) of the complaint.

[2] It was stipulated and agreed by Respondent at the hearing that all of these persons were supervisors and/or agents of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[3] Hunt was Respondent's personnel director for the period December 1992 though August 1996; she currently holds the position of personnel assistant. Respondent's present personnel director is Jeanne Rippe. No reason was given for Hunt's change of jobs and Rippe, who attended the hearing, did not testify. Rippe does not figure at all in this litigation. All references to Respondent's personnel director or hiring agent are to Hunt during her tenure in that capacity.

determine if a prospective employee was a good match for the Company, utilizing certain eligibility criteria. Hunt would consult with various company supervisors and foremen to ascertain whether the position was still available and their views on the "fit" of the applicant for the position. Generally, these supervisors or foremen would be persons directly in charge of the applicant were he to be hired.

Pursuant to the process of elimination, Hunt first considered the clarity of the application and whether it was complete or fully filled out.[4] She then checked the positions available against the position applied for; the wages being sought by the applicant and, finally, the location where the applicant resided (as compared to the location of the job). After employing these criteria, she then determined if the applicant was good "match" for the Company. Another integral and important determinant of whether a person received an interview was the applicant's calling in to check on the status of his application. In most cases, Hunt would only schedule interviews, assuming a prior determination that there was a good match of the applicant with the Company, for persons who had called back.

With respect to wages sought by the applicant, Hunt testified that it was the position of the Company, based on experience, that if a person has been making significantly or substantially higher wages than the Company was offering for the same skills and experience, that person would use a J. O. Mory job as a temporary job and, at the next better opportunity, would leave. Hunt testified that this "causes the Company to have to go through more training when we have to go through the hiring process again . . . . So it is very costly to the Company and it also—when we have a high turnover rate, it impacts the morale of the other employees working also." (Tr. 317.) According to Hunt, it was always the "common practice" of the Company not to hire applicants at entry-level positions who were currently earning higher wages if the Company could avoid it.[5] Consequently, the Company's application asks of the applicant the salary desired, "So that we have a basis to go by, to know whether the person is going to make a good match for the position or not." (Tr. 318.)

Hunt also testified that J. O. Mory utilized third-party recruitment sources to fill various positions. However, these sources were used sparingly or occasionally to place unskilled workers in the Company shop facilities and only rarely for their skilled labor needs. Hunt noted that the Company generally sought employees willing to make a long-term commitment and that the employees who come through the recruitment sources were usually looking for short-term employment. Also, these recruitment sources charge a fee which Hunt testified could be as much as 45 to 50 percent on top of (additional to) the wages the Company pays the selected employee. However, there were advantages in using temporary workers, such as being able to terminate or release them easily. Given the choice between a qualified temporary referral and a qualified walk-in candidate for a position, both being equally good matches for the Company, Hunt would select the walk-in because of the referral fees.

Hunt denied specifically discriminating against union applicants by setting aside their applications or by not giving them the same consideration as other nonunion applicants. Hunt also testified that she was unaware of any other individual at the Company who had knowingly discriminatorily set aside any union applications. Hunt also stated that she was unaware of any company policies (and, presumably, she herself employed none) wherein union applicants were given different consideration from other nonunion applicants.

#### 4. Respondent's recruitment and hiring efforts during the relevant period

Beginning in earnest in July and August 1994,[6] and continuing off and on through the Spring and Fall of 1996, Respondent admits that at various times it placed recruitment advertisements in newspapers and also utilized billboards and third-party referral services, in an effort to fill positions in several trades and occupations within its area of operations. The recruitment efforts were spurred by Respondent's stated continued growth and expansion of its business during the period in question.[7] I would find that during the covered period, there were positions (number unknown) available and open for at Respondent's various facilities and that Respondent had concrete plans to fill these positions.

### *B. The IBEW Applications*

In July and August 1994, certain members of the IBEW, in response to newspaper advertisements, billboards, and by word of mouth in the electrical trade, applied for employment with Respondent. IBEW electricians Tim Geary, Michael Geary, Roger Clayton, Harley Adams and Russell McCann submitted applications and resumes to Respondent which were hand-carried by Michael Closson, an IBEW member and paid organizer, to Respondent's Fort Wayne office, on July 21, 1994. At the same time, Closson also submitted his own application and resume.[8] Another IBEW member, Harold Wasson, personally

[4] Hunt did not expressly include skills and experience of the applicant as part of her criteria for employment. However, I conclude that in her consultations with supervisors and foremen, these matters were discussed and considered for each applicant. It would be nonsensical not to consider the applicant's skills and experience to perform skilled work.

[5] Hunt testified in response to a question from Respondent's counsel regarding the frequency of the application of this hiring practice.

> A. It would always be the practice. I am not saying that it didn't happen, depending on need, and circumstances, but I would say that that would be the general practice, yes. [Tr. 317–318.]

[6] As will be evident later in this decision, Respondent was hiring individuals for employment in the various trades as early as April 1994. However, the material time frame pertinent to the instant matter was July 1994 through November 1996.

[7] The Respondent admits, and the record herein supports, a finding that J. O. Mory in July 1994 was seeking qualified residential electrical, plumbing, and HVAC installation workers; and in the period October 1995 through November 1996, at various times was seeking individuals for HVAC positions, journeyman sheet metal workers, and other workers. Again, the number of positions was not disclosed for any periods. However, because the record clearly supports a finding that Respondent was "busy" and "swamped" with work, clearly it needed workers in probably substantial numbers in the various trades.

[8] Closson testified that he also submitted a completed application for one other IBEW union member, Joe Langmeyer. This is disputed by Respondent and the matter of Langmeyer's' application will be discussed infra. Langmeyer also was never hired by Respondent. The IBEW union charges that another IBEW union member, William Lepper, also made application with Respondent in July 1994. This application, too, is disputed and will be discussed at length infra. Lepper also was never hired by Respondent.

IBEW union member Richard Chandler was also originally included in this group of electrician applicants but was stricken from the com-

submitted applications to Respondent in July and August 1994.[9] None of the IBEW members were hired by Respondent.

1. The IBEW individual cases

*Michael Closson*

Closson testified at the hearing. Closson currently works as a paid organizer for the IBEW Union and has worked in its employ for approximately 3 years; he is a licensed journeyman electrician.[10] Closson became aware of Respondent's hiring efforts in early July 1994 by word of mouth among the union membership and through notices on billboards in the Fort Wayne area. Closson, along with business managers from the Sheet Metal Workers,[11] went to Respondent's Fort Wayne office on July 21, 1994, determined that Respondent was hiring and submitted his application and business card,[12] along with the applications and resumes of several IBEW members. Closson testified that the union applications dropped off by him were for Harley Adams, Timothy Geary (T. Geary), Michael Geary (M. Geary), Roger Clayton, Joseph Langmeyer, William Lepper, Russell McCann, and Harold Wasson.[13] Closson was advised by the receptionist that the applications would be forwarded for review to Dean Polly, Respondent's Fort Wayne office manager.

On July 26, 1994, Closson called the Fort Wayne office and asked to speak to Polly who was not available. Closson again called Respondent's Fort Wayne office on July 28, 1994, and asked for Polly who again was not available. Closson called Respondent on July 29, 1994, but this time called the South Milford office and reached Hunt. Closson asked Hunt if she had received the (IBEW) applications from the Fort Wayne office. Hunt told Closson that she had, but that she had not had time to review them. Closson left the matter at that; but later he became aware of Respondent's continuing recruitment efforts for journeyman electricians in November 1994 through newspaper ads. Closson was never contacted by Respondent regarding his application.

Hunt testified regarding her handling of the IBEW applicants. Hunt's version of these events differs materially from Closson's. According to Hunt, Clayton, Adams, T. Geary, M. Geary, and Russell McCann applied in person (but as a group) on July 11, 1994. She says, "I received them all together—they came into the office together and dropped them off." (Tr. 321.) As to applicants Closson and Wasson, Hunt testified that Respondent received their applications from them in person on July 21 and in August 1994, respectively. I have credited Closson's version of the delivery and receipt of the applications of Clayton, Adams, T. Geary, M. Geary, and McCann. It is clear from the record herein that Hunt was not directly involved in the intake of applications which were generally received by a Company receptionist and then forwarded to Hunt. Furthermore, Hunt, herself, was not confident about the circumstances surrounding the receipt of the applications of the five union members in question.[14]

Accordingly, I conclude that the applications from Clayton, Adams, the Gearys, McCann, and Closson, himself, were all delivered by Closson to Respondent on July 21, 1994.

Regarding Closson, Hunt said that she considered his application, but did not consider him for employment because first, he was currently employed with the IBEW local; second, his salary was (union) scale and as a union organizer, he was making considerably more than what Respondent would pay.

Hunt was not asked whether she ever tried to contact Closson about his application, so I assume she did not, which is consistent with Closson's testimony that he was never contacted.

As with all of the IBEW alleged discriminatees, Respondent contends that based on its employment criteria, Closson was justifiably not hired. I note that Closson's application clearly states in the part asking for Salary Desired, that he is "open" (to negotiation). Notable also is the fact that the other elements of the Respondent's employment criteria were evidently not applied; most pointedly, the criterion which placed emphasis on the applicant's calling back to check on his application, which Closson did so on several occasions. I note that Closson's qualifications are clearly not disputed and that although he was currently employed by the Union, he was a bona fide applicant for employment.

*Harley Adams*

Harley Adams is a journeyman electrician according to his application, submitted to Respondent by Michael Closson on his behalf on July 21, 1994.[15] Adams did not testify at the hearing. Respondent acknowledged receipt of Adams' application, considered by Tammy Hunt who did not personally interview Adams, did not contact him about this application and did not hire him.

Hunt testified that Adams was not hired because his application indicated he earned anywhere from $13 per hour up to $18.45 at his last job. According to Hunt, Adams was *not* holding a journeyman's card. Thus, Hunt concluded that Adams was not hireable because he did not have the necessary journeyman's card and, moreover, was making substantially higher wages than Respondent was offering journeymen with a card.

Hunt did not contact Adams to verify his journeyman status or his wages which, according to his application, was a "negotiable" item. Adams' application calls for a response covering "Subjects of Special Study and/or Licenses Held." Adams responded—"J.I.W."—which I interpret to mean Journeyman

plaint by the General Counsel. Respondent also denies ever having received his application.

[9] Respondent claims it never received Wasson's July application, but does not dispute receipt of Wasson's August application.

[10] It was stipulated and agreed by the General Counsel that Closson has been gainfully employed by Garfield Electric and the IBEW since Closson submitted his application to Respondent.

[11] It is not clear whether this person, identified by Closson as Dave Platt, was affiliated with Sheet Metal Union Local 20 (one of the Charging Parties here). Platt and the unidentified pipefitter were not called as witnesses by the General Counsel.

[12] Closson's business card was not attached to his application—G.C. Exh. 6—nd presumably was lost. However, Closson said that his business card clearly showed that he was an IBEW "representative." However, his application also clearly shows his union employment; therefore, Respondent's knowledge that he was a paid union organizer, in my view, is not disputed.

[13] There is a dispute as to whether these applications included those of alleged discriminatees Joseph Langmeyer, William Lepper, and Harold Wasson, to be discussed infra.

[14] Hunt testified (regarding the submission of these five IBEW applications):

> As far as the applications that I have here and exactly who was there, I can't say for sure. [Tr. 321.]

[15] Adams' application is contained in G.C. Exh. 2.

Inside Wireman.[16] Hunt, on the other hand, concluded that Adams did not possess a journeyman's card and did not explain how she drew this conclusion. Clearly, Hunt did not investigate further than the four corners of the application. Closson testified about Adams' experience and background and indicated that Adams had 20 years' experience (journeyman status occurs at the completion of 5 years' experience) and was licensed in Allen County, Indiana, to do electrical work.[17] I would conclude that Adams was a qualified and licensed journeyman electrician at the time of this application and a bona fide applicant for employment.

*Timothy "Tim" Geary*

T. Geary, according to his application, is a licensed journeyman electrician. T. Geary did not testify at the hearing. Closson submitted this application to Respondent on July 21, 1994, on T. Geary's behalf.[18]

Hunt acknowledged receipt of T. Geary's application and considered it along with the other IBEW applications during the July 1994 recruitment campaign. Hunt did not personally interview him and did not hire him.

Hunt testified that she was aware of T. Geary's union affiliation, as his application indicated he was currently an "electrician J.I.W." (journeyman inside wireman) making $35 per hour. T. Geary's application indicated that he desired a salary of $40 per hour for the foreman's position for which he was applying. Hunt viewed this salary request as way out of line for what Respondent would pay anyone at J. O. Mory's and basically for this reason, alone, did not hire T. Geary. Hunt did not elaborate as to the nature of the foreman's job—whether it was a supervisory position and, accordingly, possibly not covered by the Act. However, Respondent did not defend on this ground. Thus, I would conclude that this foreman's position was not supervisory; and, therefore is covered by the Act.

Based on his application, and Hunt's testimony, T. Geary's qualifications as an electrician/foreman are not in dispute.[19] I would conclude, irrespective of his being currently employed by the IBEW, he was a bona fide applicant for employment.

Hunt made her decision not to hire T. Geary solely on the basis of the wage related part of the Company's employment criteria and, in effect, did not engage in her "process of elimination" approach in not hiring him. Hunt, without contacting T. Geary, assumed that his salary demand would make him a poor fit for employment at J. O. Mory.

*Michael Geary*

M. Geary is a licensed journeyman electrician[20] according to his application which was submitted to Respondent on July 21, 1994, by IBEW member Michael Closson on his (M. Geary's) behalf. M. Geary did not testify at the hearing; however, his application was acknowledged to have been received and considered by Hunt who did not personally interview M. Geary.

Hunt testified that Respondent did not hire M. Geary because he was currently employed at Shambaugh Electric[21] at $20.21 per hour. Hunt noted that M. Geary's application also stated that his reason for wanting to leave Shambaugh was to better himself and make more money. M. Geary's application stated that he desired a salary of $21 per hour. Hunt testified that M. Geary was not hired because he (M. Geary) was employed at a higher wage and, to her, he would not, on that basis, have made a good match for J. O. Mory. Hunt did not check with the applicant to advise him, that J. O. Mory's wage structure was not commensurate with his salary desire. Hunt assumed that his salary was not comparable with the wages budgeted for the position. Hunt evidently applied no other components of the Respondent's employment criteria to reach her decision not to hire M. Geary.

*Roger Clayton*

Clayton did not testify at the hearing. Clayton, according to his application, is a licensed journeyman electrician.[22] Clayton's application was submitted to Respondent by Closson on July 21, 1994, along with the other IBEW members. Hunt acknowledges Respondent's receipt of his application and that Clayton was not personally interviewed. However, Clayton's application was considered by her along with other applications she received from the IBEW during July 1994.

Hunt testified that Clayton was not hired by Respondent for several reasons. First, Hunt noted that at the time of the Company's placing of the advertisements seeking employees, the Company was looking for skilled labor; however, the Company did not, in the course of time, actually hire skilled workers. Rather, the Company opted to bring in apprentices to "match up" with their own journeymen.[23] Hunt also noted from Clayton's application that he (Clayton) was presently employed (at Service Electric[24]) and that he was making $20 (plus) per hour as an electrician. *Hunt reasoned Clayton would not be "happy" at J. O. Mory were he to be hired because he would be making significantly less money.* Hunt testified that J. O. Mory was paying in July 1994 approximately $11 per hour for an electrician position, considering one's experience. Hunt testified that beginning or entry-level electricians in 1994 were paid approximately $9 per hour.[25]

Hunt never contacted Clayton regarding his application, and therefore never advised him of Respondent's decision to hire only apprentice-level employees[26] or to discuss wages. Irre-

[16] In support of this interpretation, see, e.g., G.C. Exh. 8, Harold Wasson's resume which uses the description "journeyman inside wireman"; the testimony of William Lepper at Tr. 133, in which he used the description journeyman inside wireman; and the testimony of Joseph Langmeyer at Tr. 143, who also refers to his rating and skill level as a journeyman inside wireman.

[17] I credit Closson's testimony regarding his knowledge of Adams' background, experience and licensing status.

[18] T. Geary's application is contained in G.C. Exh. 9.

[19] Closson testified that T. Geary had 17–18 years' experience and consistent with his application, T. Geary was licensed in Allen County, Indiana, to do electrical work.

[20] M. Geary's application is contained in G.C. Exh. 10 and indicates that he holds electrical licenses in Allen and Dekalb Counties (Indiana).

[21] Hunt had testified that she was aware that some of Respondent's competitors were so-called union companies, but was not sure of all their names. However, with respect to Shambaugh, she was sure this was a unionized company.

[22] Clayton's application is contained in G.C. Exh. 11 and indicates that he is licensed in Allen County. Closson also testified to this fact.

[23] This justification for not hiring was first advanced by Respondent in Clayton's case.

[24] I decline to infer that Hunt (Respondent) knew that Service Electric was a union company, as the General Counsel argues (*B E & K Construction Co.*, 321 NLRB 561 fn. 2 (1996)).

[25] This basically corresponds to Respondent's wage structure set out in R. Exhs. A and B for licensed journeymen electricians with Clayton's experience.

[26] Respondent did not produce any documentation for this policy change. Thus, it appears Respondent seems to have *shifted* or *changed*

spective of the policy change, Hunt seems to have relied most heavily on the wage criterion. That is, Clayton, according to his application, was making substantially more than Respondent was paying and in spite of his being "open" as to desired salary, Hunt reasoned that he (Clayton) would not be a good match for the Company.

*Russell McCann*

McCann testified at the hearing. McCann is a member of the IBEW and has held membership since 1968. He has been a licensed journeyman electrician for over 20 years. McCann has also served for over 20 years as a fifth year instructor with the IBEW Joint Apprenticeship Training Committee (JATC).[27]

McCann testified that during July 1994, he was *unemployed* and inquired of Closson about work availability (through the hiring hall), and Closson informed him about Respondent's hiring efforts and its soliciting of applications. McCann obtained an application from Closson, completed it on July 11, 1994, and returned it to Closson who, McCann understood, submitted it to Respondent on July 21, 1994. McCann, who applied for an electrician/foreman position, was never contacted by Respondent about his application for employment.

Hunt testified regarding her handling of McCann's application which she acknowledged was received by her as part of the IBEW applications in July 1994. She did not hire McCann because he was currently *employed*[28] and desired a salary of $26.60 per hour which Hunt understood to be more in line with union wages or "scale."[29]

McCann's application makes his union affiliation clear, and Hunt herself knew McCann was part of the Closson group of applicants. While Hunt says she rejected McCann because he was employed, I note that Hunt herself admitted that she hired at least two other non-IBEW applicants—Patrick Garrett in June 1994 and Ronald Swangin in August 94—when they were currently employed. Notably, McCann's qualifications are not seriously disputed—he was a qualified journeyman electrician, and I so find. I also find that in spite of his then current employment with another company, McCann was, nonetheless, a bona fide applicant for employment.

*Harold Wasson*

Harold Wasson testified at the hearing. Wasson was an IBEW business agent from 1992 through 1995; he is currently retired from that position. He has been a licensed journeyman electrician for approximately 28 years. Wasson became aware of Respondent's hiring efforts through other union members. Wasson initially testified that he was then unemployed and went to J. O. Mory's Fort Wayne office, filled out an application on July 8, 1994, on the premises and submitted it to the company receptionist.[30] On July 13, 1994, Wasson made a telephone call to Respondent's Lima Road (Fort Wayne) office to check on his application and was instructed to call Hunt at the South Milford office. When he called the South Milford office, he was told that Hunt was not in, but that he had to direct everything to and through her. Wasson left a message for Hunt to return his call as soon as possible, because "[He] really needed a job."[31]

On or about August 2, 1994, Wasson went to Respondent's Avilla office and submitted another application along with his business card because, as he testified, he was seeking a job with Respondent wherever and whenever he could.[32] Wasson returned to Respondent's South Milford office on August 22 and on August 23, to inquire about his application and on each occasion was told that Hunt was not available. Wasson, however, did manage to speak to Respondent's vice president, Michael Rowe, to whom Wasson said he introduced himself as an IBEW business agent. According to Wasson, Rowe said (among other things) that the Company was very busy ("swamped") and asked him (Wasson) whether he possessed a Michigan (electrical) license. On or about October 25, 1994, Wasson again visited the South Milford office and spoke to Gene Mory, Respondent's secretary, whom he met by chance coming out of a local post office. Wasson inquired of Mory whether Respondent was hiring electricians, to which Mory responded that the Company was definitely hiring. Mory then took Wasson back through Respondent's offices, introduced

in part the hiring criteria for Clayton alone, which, in my view, casts a shadow over Respondent's rationale for not hiring him. (Cf. *Falcone Electric Corp.*, 308 NLRB 1042 (1992) (payroll records produced by company to show no one was hired during the relevant period of alleged discrimination.) Also, I note that respect to alleged discriminatee Adams (previously discussed), Hunt rejected him for employment because Adams' application indicated that he had not achieved journeyman status. Clayton, however, by contrast, was rejected by Hunt because he had achieved journeyman status. These applications were submitted contemporaneously.

[27] McCann's application is contained in G.C. Exh. 13, which clearly states that he is a licensed journeyman electrician in Allen County and has taught electrical apprenticeship for 21 years. Hunt testified that she recognized that union membership of applicants by reference to the JATC.

[28] On cross-examination, McCann was directed to his application by Respondent's counsel. The application indicated that he was then employed at Claxton Electric. McCann reluctantly admitted that he was employed at the time. Thus, I find that at the time of his application, he was *not* unemployed as he earlier testified. However, in the context of this case, I do not conclude he was irredeemably impeached; rather, I find that his testimony is otherwise generally reliable and credible.

[29] Hunt clearly indicated that she was familiar with "scale" as a term denoting union wages as opposed to other wages or pay structures. For instance, in speaking of IBEW applicant Michael Closson, she testified:

> Again, he was currently employed. He was employed at the IBEW local. He has on here [the application] that he was—*the salary that he was making was scale*, that his position was as organizer and *from the other applications that I received I would know that he is already making considerably more than what we would be employing someone at* [emphasis added]. [Tr. 335.]

[30] Wasson's July application was not physically produced at the hearing. IBEW Representative Michael Closson testified that he delivered Wasson's application and resume (G.C. Exh. 8) to Respondent as part of a group of IBEW applications. I believe that Closson is mistaken relative to the delivery and submission of Wasson's July and August application which I believe were delivered by Wasson himself, as he testified. I believe that the July application probably was innocently lost or misplaced by Respondent.

[31] Actually, Wasson was employed at the time by the IBEW Union and making $20-$21 per hour during the time he was applying for work at J. O. Mory. As to his employment status, it is clear that Wasson at the time was not telling Respondent's agents the truth in order to get Respondent's attention and secure employment. Wasson's August application clearly states that Wasson had left Shambaugh Electric on June 28, 1992, "to go into the office." It does not indicate where he was employed, but a telephone number is included. Respondent has not asserted any defense of giving false statements in the application or by Wasson as grounds for not hiring him.

[32] Wasson also testified that he went to the Respondent's Angola office on August 3, 1994, presumably, to check on his application; but he did not submit an application at that time.

him to Hunt and instructed Hunt to get the paperwork completed so that Wasson could be hired. At the meeting, Wasson brought up the subject of his previously submitted applications with Hunt. Hunt, whose office was being painted at the time, told Wasson she could not find his application. Hunt also acknowledged to Wasson that Respondent was swamped (with work). On that occasion, Hunt interviewed Wasson at the office and asked him whether he was seeking a full-time position—he was; whether he was willing to work overtime—he was; whether he had reference—he did; and whether he preferred commercial or industrial work—he had no preference. Hunt concluded the interview and advised that she would try to find his application, check his references, and get back with him in a couple of days. On or about November 10, 1994, Wasson again called the South Milford office and once more spoke to Hunt. Wasson asked her why she had not gotten back to him, and Hunt claimed that she had been too busy, and had not contacted Wasson's references. Wasson ended the conversation by again reminding her that he was looking forward to her calling him back, because, "[He] really needed the job." (Tr. 108.) Wasson was never re-called by Respondent.

Hunt explained her handling of Wasson's application.[33] Hunt did not hire Wasson because he was *already employed at Shambaugh Electric*[34] as an electrician, and she knew thereby that he was making more there than he would receive at J. O. Mory. Acknowledging one meeting with Wasson, Hunt stated that Wasson told her he was interested only in short-term employment—work through the Winter—but she was only interested in employees willing to work for a longer time. Accordingly, Wasson was not hired by the Company. Hunt did not mention the several calls made by Wasson to check on the status of his application; nor the time Gene Mory introduced Wasson to her. Hunt did not reveal much of what happened at the interview with Wasson.

I have examined Wasson's application (and resume), and I note at the time, Wasson was *not* employed by Shambaugh. Wasson, on his application, clearly stated that he had left that company in June 1992. So, to the extent Hunt relied on his employment at Shambaugh to reject Wasson for employment, she was clearly in error. Hunt also determined that Wasson would not be a good match for the Company because he was making too much money, as compared to J. O. Mory wages, although his application clearly states that as to salary desired, Wasson was "open" (to negotiation).

I was not impressed with Hunt's testimony with respect to her handling of Wasson's application. On the other hand, Wasson was not a very impressive witness. First, he testified that he was unemployed at the time of application, which was simply not true. Second, he also seemed to develop memory lapses on examination by the Respondent's counsel, quite unlike his rather precise, forthright and unhesitating answers to the General Counsel's questions. In resolving this issue, I have considered both Hunt's and Wasson's testimonies, in toto, regarding Wasson's application and would conclude that of the two, Wasson's testimony is the more believable.

In finding Wasson more credible, I have taken note that significant aspects of his proffered testimony are unrebutted. For instance, Wasson pointedly testified to his repeated checks on the status of his application and with Hunt in particular. Hunt mentions merely one such possible meeting and does not discuss much, if at all, the interview that Wasson says took place. Also, Hunt did not testify at all about the time Gene Mory introduced Wasson to her and supposedly directed her to hire him. It would seem that this was a most significant event, yet Hunt is silent as to what happened at the meeting or if it took place at all. For these reasons, combined with Hunt's clearly mistaken reading of Wasson's application, I would find and conclude that Wasson is the more credible witness with respect to material facts surrounding Wasson's attempts to be employed at J. O. Mory.

Wasson was clearly qualified for an electrician's position. Wasson had substantial experience in the trade, was licensed in two counties and, as far as Hunt knew, was desperately seeking employment at a time Respondent desperately needed electricians. Although Wasson was not truthful at the time of his application to Respondent with respect to his true employment status, he was candid in admitting that one of his reasons for applying at J. O. Mory was to organize Respondent's employees. In spite of employment, he was in my view, nonetheless, a bona fide applicant for employment. I note on this point that one of Respondent's executives evidently considered his employment as an IBEW business agent no barrier to employment at the Company and indeed wanted Hunt to hire him.

2. The disputed IBEW applications

*Joseph (Joe) Langmeyer*

Langmeyer testified at the hearing. Langmeyer is a current member of the IBEW and has been a member since February 1978. Langmeyer has been a licensed journeyman "inside wireman" (electrician) since 1980. Langmeyer learned of job openings at J. O. Mory through Mike Closson and through notices on billboards in July 1994. Langmeyer obtained an application from Closson, filled it out and returned it to Closson for submission to Respondent. Langmeyer testified that Closson told him he was going to submit it to J. O. Mory. Langmeyer did not personally go to the Respondent's offices to apply for a job and never called the Company to follow up on the status of his application. Langmeyer was never contacted by Respondent.

Hunt testified that Respondent never received Langmeyer's application and he never was considered for employment for that reason. As far as Hunt was concerned, Langmeyer never applied for employment, a fact confirmed by a search of company records which did not disclose any record of his having submitted an application for employment.[35]

Closson testified that Langmeyer's application was among those he submitted to Respondent on July 21, 1994, at Respondent's South Milford office. On cross-examination by Respondent's counsel, Closson acknowledged that he did not have a copy of Langmeyer's application, but explained that his copies

[33] As previously noted, Wasson's personally submitted application is G.C. Exh. 7; G.C. Exh. 8 is a copy of his resume introduced by Closson.

[34] Shambaugh was known by Hunt to be a "union" contractor.

[35] Because Respondent denied receipt of Langmeyer's application, the General Counsel presented Langmeyer with a blank J. O. Mory application and asked him to explain his responses to the questions in the application. Langmeyer was not altogether sure of all of the actual responses he made. However, based on the clear and firm responses he made regarding his background and experience and, by comparison to the other applicants, he was, in my view, a qualified licensed journeyman electrician and was therefore at the time a bona fide applicant for employment.

were possibly lost by the NLRB investigators to whom he had provided copies pursuant to the investigation of this case. I note that Closson also testified that he submitted the application of another alleged IBEW union discriminatee, William Lepper, on July 21, 1994. However, Lepper testified at the hearing that he personally submitted his application to Respondent. Thus, while I have credited Closson's previous testimony about certain other applications he left with Respondent, I believe he is mistaken in his belief that he delivered Langmeyer's application to Respondent (as he was with respect to Lepper).

In any event, the General Counsel has the burden to show by a preponderance of the evidence each material element of the charge. A crucial threshold point to be established regarding an alleged discriminatory refusal to hire is whether Respondent knew of an applicant's intention or desire to be hired. In regard to Langmeyer, I cannot find that Respondent actually received his application. I note there has been no suggestion of irregularities, questionable or underhanded conduct with respect to records or record production by Respondent. Therefore, at best, the evidence of Langmeyer's purported application is in equipoise. Accordingly, with respect to the charge of Respondent's alleged unlawful refusal to hire, or consider for hire, Langmeyer, the General Counsel has failed to meet his burden of proof regarding the threshold requirement that it be shown an application for employment was actually submitted to Respondent. Accordingly, I would dismiss the complaint as it relates to alleged discriminatee Langmeyer.

*William Lepper*

William Lepper testified at the hearing and stated that he was and is a member of the IBEW Union and became a member in February 1951. Lepper is retired presently (as of January 1995), but retired as a journeyman inside wireman. He has been a journeyman electrician since 1958. Lepper became aware of the Respondent's recruitment efforts in July 1994 through a local newspaper advertisement and decided to apply for a position. Lepper told Closson of his plans to apply, but took it on himself to apply personally. Lepper testified that he went to the Respondent's Lima Road (Fort Wayne) office, obtained an application, filled it out, and turned it in to the company receptionist. After submitting the application, about a week later, he saw another J. O. Mory advertisement almost identical to the first one. This ad, however, stated that applicants had to have a city or county (electrician's) license. On the next day, after reading this ad, Lepper went to the Lima Road office again and presented his license to the receptionist, who copied it and told him that it would be associated with his prior application.

Lepper at the time was unemployed, having been laid off from a previous job in the middle of July 1994. On cross-examination, Lepper reiterated that he applied directly and personally for employment at the Company, and that no one had submitted an application on his behalf. Lepper was not asked by either party whether he ever followed up on the status of his application (after supplementing it with his license) or whether he was ever contacted by the Company. I assume by inference then that he made no additional status checks on his application.

Respondent's Hunt testified that to her knowledge, Lepper did not ever apply for a position at J. O. Mory and, accordingly, was never considered as a prospective employee.[36]

I have stated earlier herein that it is the General Counsel's burden to establish by a preponderance all facts material to the charge in question. In my view, Lepper testified credibly regarding his attempt to get hired at J. O. Mory. However, there is no reason to doubt Hunt's denial of receipt of Lepper's paperwork. Clearly, records can be innocently or inadvertently lost or misplaced.[37] In the absence of any proof of any allegation of misconduct or irregularity in the keeping and production of records by Respondent, I cannot disbelieve or discredit Hunt's denial of receiving Lepper's application. On this point, it has been established beyond cavil that applications during this period generally were submitted to Hunt through other persons, but it seems primarily through the South Milford receptionist, Nancy Clendenon. Yet when given the opportunity to examine Clendenon, the General Counsel did not question her about Lepper's (or Langmeyer's) application, and thus was lost an opportunity to resolve the issue.

Accordingly, I would find that while Lepper's testimony of having submitted an application is generally credible, I also find that Respondent's denial of receipt of his application is equally credible. I note that there was a substantial volume of applications received by Respondent during the period that Hunt received applications, and that a person who could perhaps have shed light on the handling of Lepper's (and Langmeyer's) application was not examined about the issue. Accordingly, I find that the General Counsel has not met his burden of proof as to the alleged discriminatory failure to hire or consider for hire, Lepper. I would dismiss the complaint as to this charge.

*C. The Sheet Metal Union Applications*

In October 1995, in response to newspaper advertisements placed by Respondent, five employee/members of the Sheet Metal Union went to the Respondent's South Milford facility as a group. The Sheet Metal union members were Terry Anspaugh, John Tafelski, Kelly Ullery, John Kereszturi, and Michael Starnes and each appeared onsite wearing various union paraphernalia. Each member obtained and submitted an application to J. O. Mory on October 9, 1995. This group was acting on the instructions of Kereszturi, a paid Sheet Metal organizer, and each of these individuals were, themselves, paid employee-members of the Sheet Metal Union. With the exception of Kereszturi, who was hired approximately 1 year later, none of this group was ever hired by Respondent.

[36] As with Langmeyer, because Respondent denied receipt of Lepper's application, the General Counsel presented a blank company application form and asked him to fill it in on the witness stand as he did when he submitted it. I was impressed with Lepper's recall and his qualifications as a licensed journeyman electrician. In my view, he was at the time fully qualified for the available electrician positions and was a bona fide applicant.

[37] Closson testified that NLRB investigators possibly lost some of the Union's records in the course of the investigation of this matter.

1. The Sheet Metal individual cases[38]

*Terry Anspaugh*

Anspaugh testified at the hearing and related that he was a Sheet Metal Union member and has been a member for 5 years; he is currently a fourth year apprentice and was a third year apprentice in October 1995; and was and is employed by the Sheet Metal Union. Anspaugh became aware of the Respondent's hiring efforts through newspaper ads and, along with several other union members, went to the South Milford office to apply for any sheet metal worker job; Anspaugh wore a Sheet Metal Union hat at the time he applied. Anspaugh completed an application onsite, submitted it to the Respondent, and was told that Hunt was responsible for job interviews. Anspaugh was not hired by J. O. Mory.

Hunt testified and explained her handling of Anspaugh's application. Hunt said that Anspaugh was not initially considered for employment, because the Company had decided not to fill the advertised positions, even though some persons had already been interviewed.[39] However, in March 1996, the Company had decided to hire again. Accordingly, on March 6, 1996, Hunt attempted to re-contact Anspaugh for possible employment and left a message with his wife to have Anspaugh call her (Hunt) for an interview.[40] Anspaugh's wife advised that Anspaugh was at school on that night. Anspaugh never called back, and was never heard from again by Respondent.

On cross-examination by Respondent's counsel, Anspaugh testified that he did not personally receive the call from Hunt, but acknowledged that his wife did indeed receive the call from Hunt. Anspaugh admitted that he never called Hunt back, because he never got the number and so he never returned Hunt's call.[41]

There is no genuine dispute as to Anspaugh's qualifications for employment or Respondent's knowledge of his employment with the Union, made manifest by his attire and his application. I would find and conclude that in spite of his employment with the Union, that he was nevertheless a bona fide applicant. Furthermore, it is clear that Hunt did not initially consider Anspaugh for employment in October 1995. However, I would find that Hunt did consider him for work in March 1996 based on his October application, which was the only application submitted by him to Respondent. I would find that Anspaugh knew (by and through his wife) that he was being considered for employment at J. O. Mory, but decided not to follow up on Hunt's call. Accordingly, I would find that Anspaugh was not hired by Respondent, but his nonhiring was not based on any unlawful motive or reason cognizable under the Act. Accordingly, I would dismiss the complaint as to Anspaugh.

*John Tafelski*

Tafelski testified at the hearing and related that he has been a member of the Sheet Metal Union for approximately 7 years; he currently is a fourth year apprentice. Tafelski was and is a paid Sheet Metal Union organizer. During October 1995, Tafelski learned of possible job openings at J. O. Mory through newspaper advertisements. On October 9, 1995, he and several other Sheet Metal union members went to Respondent's South Milford office as a group and there made application for an opening. The group all entered together and were each wearing some form of (Sheet Metal) union attire (hats and/or jackets).[42] Tafelski, himself, was wearing a union hat and jacket. Tafelski filled out an application for employment as a service tech and HVAC installer[43] and submitted it to Respondent through its receptionist. Tafelski said that he was not interviewed on that date because Tammy Hunt was not available. Tafelski called on two subsequent occasions to check on the status of his application and finally reached Hunt. Hunt scheduled an interview for October 28, 1995. On the appointed date, Tafelski met with Hunt at the South Milford office; no one else was present at this interview session.[44]

According to Tafelski, Hunt basically discussed the Company's benefits and programs, inquired about his experience, his willingness to travel to the Syracuse area (where the job presumably was) and discussed the wages of the position. Tafelski also stated that Hunt asked him if he were willing to still work for the Union, because his application indicated he was currently a union organizer. Tafelski, in response to these inquiries, told her his experience was in both commercial and industrial sheet metal, and that traveling to the Syracuse area presented no problem for him. Tafelski made no comment regarding wages, but he advised Hunt that he would continue to work for the Union if he was hired. The interview concluded, according to Tafelski, by Hunt's advising him that she would have to talk to a foreman who would, in turn, talk to him; and then the foreman and she would evaluate him and reach a hiring decision.

After this interview, Tafelski, on October 27, 1995, called the South Milford office and inquired about his application. He spoke to Hunt who advised that the Company was still interviewing candidates and she would note his call. Tafelski was never re-contacted by Respondent.

Hunt testified and explained her version of these events. Hunt acknowledged that his application was received by her, along with the application of other members of the Sheet Metal Union workers on October 9, 1995. Hunt knew at the time that Tafelski was a union organizer by virtue of his application which indicated he was applying for a service technician or

[38] Alleged discriminatee Kelly Ullery will be discussed, infra, in a separate section of this decision.

[39] Respondent did not produce any records in support of this claim of a policy change. However, the General Counsel offered no evidence to rebut this nor did he otherwise seek to discredit this testimony. I would therefore credit Hunt's testimony regarding this matter which was explained in greater detail through discussion of other applicants.

[40] Hunt stated that she made a note on Anspaugh's application—— G.C. Exhs. 18 and 18a—of the call to Anspaugh's wife on March 6, 1996, and a note dated March 8, 1996, indicating "no return call."

[41] Anspaugh testified as follows in response to a question from Respondent's counsel:

> Q. So you never bothered to try to call Ms. Hunt despite the fact that you knew that she worked at J. O. Mory at [the] South Milford office to schedule an interview?
>
> A. Correct. [Tr. 229.]

[42] Tafelski stated that he was in the company of John Kereszturi, Terry Anspaugh, Kelly Ullery, Michael Starnes, and another whose name he could not remember except that this person, like Starnes, was from the Fort Wayne area.

[43] Tafelski was a third-year Sheet Metal apprentice at the time. He also possessed a chauffeur's license and a certificate for universal recovery and reclaiming. These licenses would appear to have no application to or bearing on Tafelski's qualifications for the job he sought with J. O. Mory. Tafelski's application is G.C. Exh. 14.

[44] Tafelski was accompanied to the South Milford office by Michael Starnes who was purportedly checking on his application. Starnes was not present during this interview.

HVAC installer position. Disputing Tafelski, Hunt says that she interviewed Tafelski on the *same* day he dropped off his application and that at that time, he was wearing his union hat. Hunt, on direct examination by Respondent's counsel, explained why she did not hire Tafelski. First, Hunt reiterated her prior testimony that the advertised positions were not filled because of a downturn in the Company's business and the decision to use the existing South Milford employees for a proposed expansion of work in the Syracuse area. Second (and this was evidently the more important stated reason for not hiring Tafelski) was Tafelski's unpleasant and intimidating attitude and behavior during the interview which led her to conclude that he would not be a "good match" for J. O. Mory. Hunt found Tafelski to be "pretty offensive" and that she felt he was trying to intimidate her, i.e., by asking *her* more questions than she of him; by providing very short (abrupt) answers to her questions and not providing much in the way of information; and by being more aggressive than one should be in an interview. For instance, Tafelski, according to Hunt, raised the subject of his union organizer status and very sarcastically asked whether union status did not bother her. Hunt replied:

> [H]is union affiliation did not make a difference to me but that my job was to find the best match for the position that I was looking for and part of that is for full time work with J. O. Mory. [Tr. 365.]

Hunt went on to say:

> By him [sic] [Tafelski's] doing that through the interview process, I felt that I was the one—I was going through an interrogation rather than going through an interview. [Tr., id.]

Hunt was not asked by either party anything about conversations with Tafelski about his qualifications, work experience, willingness to travel to Syracuse or wages. I would credit Tafelski's testimony as to these conversations. However, I do not credit Tafelski's testimony, first as to the date of the interview and second that Hunt raised the issue of his involvement with the Union in the course of the interview. On these points, I find that Hunt was eminently more credible and I conclude that her version of the date and other aspects of their encounter are more believable. In evaluating the credibility of Tafelski (Hunt), I have carefully considered pertinent parts of his testimony and his demeanor on the stand, and I have found him wanting as a fully credible witness. Notably, Tafelski was not sure of his responses, was hesitant, evasive, changed his testimony and, in fact, was in my view somewhat untruthful. For example, Tafelski, on direct examination in response to a question from the General Counsel about his experience, said "I told her commercial and residential." Tafelski answered later that he had done residential work. When he was asked for whom and when had he done such residential work, he unresponsively answered, "I learned it in school." (Tr. 182.) Tafelski then responded confusingly that he had done residential work, "not for an employee [sic] but I done [sic] a few [jobs] for personal people." (Tr. 182.) Tafelski finally admitted that he had never worked for a contractor doing residential work.

In response to another question from the General Counsel regarding the location of the new position, Tafelski said, "I think, it was the Syracuse area or something she was talking about." (Tr. 178.) On cross-examination, the following exchange took place between Tafelski and Respondent's counsel:

> Q. During the interview process, it was your understanding that the job was for the Syracuse area?
>
> A. No. [Tr. 180.]

When he replied no, the following exchange occurred between Respondent's counsel and Tafelski:

> Q. I thought you testified that she said it was for
>
> . . . . .
>
> A. She mentioned that. She said they
>
> . . . . .
>
> Q. Okay. So during the course of the interview, she said that the job position that they were looking for was
>
> . . . . .
>
> A. She asked.
>
> Q. the Syracuse area?
>
> A. Right. She asked me would there be a problem for me to travel in that area and I told her no. [Tr. 182.]

Hunt, on the other hand, was direct in her responses and seemed candid and forthright. I note, that in spite of her awareness of the unfair labor practice charges here, and Tafelski's union affiliation, she candidly expressed her views of him as a candidate for employment. Hunt's testimony makes clear that Tafelski did not impress her, and in fact had offended her. She did not mince or equivocate about what happened at the interview. Accordingly, I tend to believe her when she stated that Tafelski brought up the Union in the interview. I also believe Hunt's testimony regarding her perceptions about and reactions to Tafelski's behavior at the interview. As to Tafelski's qualifications for service technician and/or HVAC installer, I find him qualified for these jobs, and that irrespective of his union employment, he was a bona fide applicant.

However, I also find and conclude that it is both plausible and reasonable for Hunt as a hiring agent to conclude that a person exhibiting the behavior she attributed to Tafelski on that basis would not be a suitable employee. I believe Hunt decided not to hire Tafelski for these reasons and not because of his union activity or involvement. Accordingly, I would dismiss the complaint as to Tafelski.

*Michael Starnes*

Sheet Metal union member Michael Starnes testified at the hearing. Starnes has been a member of the Union for approximately 5 years and at the time of his application for employment at J. O. Mory, his application indicated that he was a third-year apprentice. Starnes became aware of Respondent's hiring efforts in October 1995 through newspaper advertisements. Accompanied by fellow union members Kereszturi, Till, and individuals described as his three apprentices from South Bend,[45] Starnes made application for a HVAC installer position at the Company's South Milford facility. All of the group were wearing some form of union insignia or paraphernalia, and Starnes was wearing a union hat. After completing his application and submitting it, Starnes learned that Hunt was responsible for hiring. Starnes made several calls to the Company during October 1995 to check on his application and specifically asked for Hunt. On each occasion, he was told that Hunt was not available but that his call would be noted.

[45] Presumably, Sheet Metal union members Tafelski, Anspaugh, and Ullery. Starnes testified that Kereszturi organized the group and they all went in together to apply for work.

Starnes reached Hunt sometime in November 1995 by telephone and conversed with her. In that call, according to Starnes, Hunt indicated that the Company was looking for workers for its Michigan area of operations and inquired of his (Starnes') willingness to work in this area. Starnes indicated to Hunt that he was willing to work in Michigan.

According to Starnes, Hunt stated that she would make note on his application of the call; and the conversation ended. To his knowledge, Starnes said that he was never contacted by the Company regarding his application.

Hunt testified regarding Starnes' application and explained her handling of his application. Hunt did not attempt to or consider Starnes for hire in October 1995, because the Company elected not to fill these positions.[46] However, on February 22, 1996, she unsuccessfully attempted to reach Starnes to schedule an interview, but she left a message for him. On the following day (February 23), Hunt called Starnes' number and got no answer. Hunt again called on February 26 and left a message for Starnes. Hunt made her last attempt to reach Starnes on March 1 and left a message asking whether he was still interested in employment and to leave a message with the receptionist if she (Hunt) were not available. Hunt pointed to her handwritten notations on Starnes' application (GC Exh. 16) to corroborate her attempts to at least schedule an interview for Starnes. Hunt was not asked by Respondent's counsel about any conversation that she may have had with Starnes prior to her February-March telephone call. I will assume this conversation occurred, crediting Starnes here. I also credit Starnes repeated attempts to check on his application during *1995*, including a November or December 1995 visit by Starnes to Respondent's Fort Wayne facility.[47]

As to any messages from Hunt in February and March 1996, Starnes testified that he does not recall receiving any such message either personally or through his roommate at the time. Starnes specifically denied receiving any messages on his answering machine. On this issue of whether Respondent, through Hunt, attempted to contact Starnes for purposes of 1996 possible employment with the Company, I credit Hunt's testimony over Starnes. I note that Hunt testified that generally, it was her regular practice to annotate an application regarding various and sundry job related matters and, in Starnes' case, this practice was clearly followed. I also note that Starnes testified that during the time of the purported calls from Hunt, he began full-time employment with another contractor—around mid-February 1996—around the time Hunt commenced her calls. Therefore, in all likelihood, Starnes could have missed her calls. Starnes further testified that he never even consulted with his roommate about any calls regarding employment from J. O. Mory. Furthermore, Starnes testified that he discontinued his status calls in 1995 and never made checkup calls to Respondent in 1996.

Thus, I believe that Hunt considered Starnes for employment based on his October 1995 application.[48]

Consequently, as to Starnes, I would find and conclude as follows: Respondent was clearly aware of Starnes' union affiliation at the time of his application for employment on October 9, 1995; that Respondent, based on that application, considered Starnes qualified for possible employment with the Company; Respondent, through its agent Hunt, in good faith repeatedly and earnestly attempted to contact Starnes to schedule an interview for possible employment with the Company. Starnes, for reasons beyond the control of Respondent, did not receive the messages regarding Respondent's interest in interviewing him for possible employment. Starnes made no independent efforts to check on the status of his application after December 1995 and at no time in 1996 through the present.

Accordingly, I would find and conclude that Respondent did not violate the Act in not hiring alleged discriminatee Starnes, and the complaint should be dismissed as to him.

*James Till*

Till testified at the hearing. Till has been a member of the Sheet Metal Union for approximately 5 years and currently is a fourth year apprentice; he was a third year apprentice employed by the Sheet Metal Union on October 9, 1995, when he made application for a sheet metal installer position at J. O. Mory. Till at that time wore union insignia, a union ball cap. Till, like Ullery, completed his application at the South Milford office and submitted it to the receptionist who advised him that Hunt was responsible for hiring. Till checked on the status of his application periodically and ultimately reached Hunt who scheduled an interview for October 19, 1995, at the South Milford office. Till was interviewed by Hunt as scheduled. Till's interview with Hunt covered his experience and his willingness to travel. According to Till, Hunt said that the Company was looking to fill *residential* sheet metal installers, and she noted that Till's experience was mostly in commercial and industrial areas. In response, Till advised Hunt that, first, travel would pose no problem for him. Second, he told her that he had not done any residential work, but he considered residential installing no more difficult than commercial or industrial; it was (in his view) in effect the same type of work but on a smaller scale. Two weeks later, Till and fellow union member Starnes saw a lighted sign advertising the Respondent's need for HVAC installers outside of the Company's Fort Wayne office, which prompted them to check on their applications and inquire if another application were necessary. The receptionist, being told of their prior applications a the South Milford office, said another application would not be necessary.

At this time, Till also asked for how long his application would be good or active. Till came to understand that his application was good for a fairly long period of time. Approximately 1 week later, Till telephoned the South Milford office again to check on his application. Till spoke to Hunt who indicated that she (Hunt) and a supervisor were then going over applications and his (Till's) call would be noted on his application. All of these events took place in 1995. Till was not hired by Respondent.

[46] Previously discussed.

[47] Starnes testified that approximately in November or December 1995, he and fellow union member Till went to the Respondent's Fort Wayne office in response to a billboard sign that said apply within for work. However, because of their applications at the South Milford office, Starnes and Till were told by the receptionist that they need not reapply at Fort Wayne, that those applications would also be good for the Fort Wayne jobs.

[48] I note that Starnes testified that Respondent's receptionist told him that applications were considered "active" for 6 months and would be placed thereafter in an inactive status for 1 year. Hunt's calls were made within the 6-month period.

Hunt testified regarding Till's application. Respondent, at the time of placing employment ads in October 1995, needed to fill residential installer positions in the Company's Syracuse office which was part of a planned expansion of the Company's operations there. However, due to a downturn in business at the South Milford office, those advertised positions were not filled; rather, the Company opted to use its existing South Milford employees for the Syracuse operation. In February 1996, the Company again began looking for individuals to fill HVAC positions in the South Milford office. In October 1996, the Company also needed workers for its sheet metal division in Avilla and began a search for this operation. Thus, according to Hunt, the Respondent, during the period covering October 1995 through October 1996, advertised as needed for workers for essentially three of its facilities.

As to Till, Hunt initially interviewed him on October 19, 1995,[49] but did not hire him then, because the positions were not filled because of the downturn in the Company's business.

Hunt testified that on February 19, 1996, she tried to recontact Till to offer him a job and left a message. She called again on February 20 and was told by a woman that Till was out running errands. On February 21, Hunt called twice, and on the fist time, she did not get an answer; on the second call, she was told that Till had already gone back to work.

In October 1996, because Respondent needed workers for its sheet metal division, Hunt again called Till and was told by a woman that if the call was about a job, that he (Till) was not interested.

Till, on cross-examination by Respondent's counsel, stated that he was not aware of any specific calls from Respondent (or Hunt). However, Till said that he received many telephone calls, and his wife took some of those calls on his behalf. Till understood that some of the calls received by his wife were from employers about jobs, but she could not remember the names. As to the October 11, 1996, alleged call from Hunt to Till's wife, he was unsure of its being made by Hunt or received by his wife. Till was not aware of Hunt's proposal of a job offer on October 11, 1996.

Regarding Till's qualifications for jobs offered by Respondent, there is no dispute or controversy. Accordingly, I would find and conclude that he was a qualified applicant for employment when he submitted his application. I also would find and conclude that irrespective of his employment with the Sheet Metal Union at the time of his application, he, nonetheless, was a bona fide applicant for employment.

I credit Hunt's testimony regarding her attempts both to contact Tills and to offer him employment at J. O. Mory during February and October 1996. I note that on this point that Hunt testified credibly and forthrightly, and her notes, while not wholly consistent with her testimony, are in the main corroborative of her testimony.[50]

I would find and conclude that Respondent, as to Till, attempted to hire him based on his October 5, 1995 application on two occasions in 1996. However, Till was not hired by Respondent because of a failure of communication of its intentions to hire him, which failure was not the fault of Respondent and, specifically, not because of Till's involvement with the Sheet Metal Union or because of protected activity. Accordingly, I would dismiss the complaint as it relates to Till.

*John Kereszturi*

Kereszturi is currently and has been a paid union organizer for the Sheet Metal Union since September 1992. He learned of the availability of job openings at J. O. Mory on or about October 8, 1995, through newspaper ads in the South Bend area. Kereszturi, on October 9, 1995, went to Respondent's South Milford office between 9:30 to 10 a.m., accompanied by Sheet Metal union members Michael Starnes, James Till, Kelly Ullery, Terry Anspaugh, and John Tafelski, all of whom were wearing union insignia/paraphernalia of one kind or the other, i.e., union jackets or union hats. Kereszturi and the others all filled out applications onsite and submitted them. Kereszturi also gave the receptionist his business card which clearly identified him as an organizer employed by Sheet Metal Union. Kereszturi asked the receptionist about scheduling interviews for himself and the others and was told that Tammy Hunt was responsible for interviews, but she was not available at the time. Kereszturi then left the site but later, that same day, called Respondent again to speak to Hunt who was still reportedly unavailable. Kereszturi was not contacted by J. O. Mory regarding his application at all in October nor at any other time in 1995. However, he was contacted by Respondent through Hunt in October 1996 and asked if he were still interested in a job with the Company. Kereszturi was eventually hired by the Company after an interview with Hunt in mid-October 1996.

Hunt explained the circumstances of Kereszturi's eventual hiring. Noting that his application was among several dropped off personally by him and the other Sheet Metal Union workers as a group, Hunt testified that Kereszturi was not considered for employment in October 1995 because the Company decided not to fill the position at that time. However, in October 1996, Respondent required workers proficient in commercial sheet metal work and some fabrication at its Avilla facility. Hunt considered Kereszturi for these. Hunt interviewed him, hired him and after he completed an orientation program, Kereszturi began working for the Company on November 6, 1996. Hunt acknowledged that she knew Kereszturi was "union" at the time of his application because of his business card which was attached to his application. Kereszturi only worked for approximately 2 days and voluntarily left the Company's employ.[51]

Here, as with the other Sheet Metal union members who made application for employment in October 1995, Kereszturi's qualifications for employment are not disputed, as is evident by his later hiring by Respondent. Accordingly, I would find and conclude that at the time of his initial application, Kereszturi was a bona fide applicant for employment with Respondent, his employment with the Union notwithstanding. I find that Respondent, through its agent Hunt, considered Kereszturi for employment based on his October 9, 1995, ap-

[49] Hunt testified that she is sure of this date, because she claims this date is noted on one of the documents of his application. Till's application, G.C. Exh. 17, has several annotated date references, almost all of which indicate 1996 dates; the exception is a reference to "10/10_" (no year is indicated). There is no entry precisely indicating October 19, 1995, on Till's application.

[50] By contrast, Till was unsure of whether he received the calls in question; but he did acknowledge that his wife received calls from employers about jobs. Thus, I find that it is more likely that Hunt made the calls in question to Till.

[51] Kereszturi testified that after he requested a wage increase which was rejected by Respondent; he then went on economic strike against the Company, quit, and never returned to Respondent.

plication,[52] interviewed him and ultimately hired him, fully aware of his union employment and possible involvement in protected activity.[53] I would conclude that Respondent did not violate the Act as to alleged discriminatee Kereszturi and would dismiss the complaint as to him.

2. The application of Sheet Metal Workers' union member Rick Creswell

As stated earlier herein, in the spring of 1996, Respondent needed to fill certain skilled positions, including licensed electricians, sheet metal journeymen, HVAC service technicians, and other jobs. At this time, Respondent utilized the services of a third-party referral company, CSR Technical Services (CSR) to assist in the recruitment effort. In April 1996, CSR placed ads for these positions in local newspapers and directed interested parties to act immediately and contact CSR. Respondent *was not* identified as the principal employer in these ads.

Rick Creswell testified at the hearing. Creswell is currently a fourth year sheet metal apprentice and has been a member of the Sheet Metal Union for 7 years; in April 1996, he was a third year apprentice.[54] Creswell's application indicated that he was and is a paid organizer for the Sheet Metal Union.

In April 1996, Creswell saw an ad in a local newspaper for journeyman sheet metal and HVAC positions. The ad instructed interested persons to contact CSR. Responding to the ad, Creswell went to CSR and submitted an application. Once there, Creswell was interviewed by CSR officials. He provided background information which he identified as being included on a CSR-prepared resume sheet.[55] Creswell came to understand after a time that J. O. Mory was the Company to which his application would be referred. Creswell checked with *CSR* four or five times, perhaps more, regarding the status of his application. Creswell *never* made any contact with J. O. Mory and was never contacted by the Company for employment.

Tammy Hunt testified regarding Creswell's application. Hunt acknowledged that the Company at times has used third-party referral services to fill positions and that CSR has been one such service used by Respondent. However, as to Creswell's application, Respondent never received it and, therefore, she did not consider him for employment.

A representative from CSR was called as a witness by the General Counsel. CSR's Karen Wolf testified and related that she was the technical account manager for CSR. According to Wolf, CSR operates as a complete staffing service and handles the placement of light industrial, clerical, and technical personnel. CSR also performs out placement personnel work. In April 1996, CSR received a request from J. O. Mory to find potential employees in certain job categories, including sheet metal journeymen. Among the steps taken by CSR to fill this request, it placed advertisements in local newspapers in April 1996.

Wolf explained that for every job order received by CSR, they prepare a resume of the candidate's background and experience, his requested salary, CSR's fee, and whether the individual will be a direct hire. This package is then submitted to the requesting company. Wolf identified documents comprising Creswell's application and said it was handled in the customary way as outlined above. Wolf, however, said that Creswell's application was not prepared by her personally; rather by Charmaine Wooleridge, then a CSR recruiter. Wolf testified that Wooleridge would have been responsible for transmitting Creswell's application to Respondent. Wolf had no role in the actual submission of Creswell's paperwork and could not state that it was in fact sent to Respondent. CSR's Creswell package included a fax cover sheet. Wolf was asked about the activity report that usually is printed out to document the transmission. Wolf said that she did not have a report for this particular transmission.

The issue of receipt of the Creswell package redounds to credibility. Respondent, through Hunt, steadfastly maintains that it did not receive Creswell's application; therefore, it never considered him for employment because of that fact, as opposed to his union involvement which is clearly indicated in the CSR package. The General Counsel argues, in essence, that Respondent's denial is simply not plausible. He cites the steps undeniably taken by CSR to present Creswell's application (from the receipt of Respondent's request, the placing of ads, receiving and accepting applications, and preparing a Creswell application) are clear proof that CSR must have sent it on to Respondent; that it is highly unlikely after doing all of this, that CSR would not complete the process by sending the package along to Respondent.

The General Counsel's argument facially is persuasive. However, his argument and the facts do not gibe. First, it is clear that the witness the General Counsel chose to present the Creswell evidence was not the most appropriate person to establish the chain of proof necessary to establish receipt. Charmaine Wooleridge, not Wolf, was that person. There was no reason given for her absence, so I will assume she was available and could have been called. Second, there is the missing fax activity report, a document that would certainly have clinched the General Counsel's argument. Yet, the activity report was not produced. I decline to infer that it is available and, moreover, that it would have indicated receipt by Respondent.

Respondent has denied receipt of the Creswell application and the record herein permits of no reason to question the denial. As noted, there have been no allegations of irregularities or other questionable conduct on Respondent's part in the course of the litigation of this matter.

I would conclude that Creswell was a qualified journeyman sheet metal worker at the time of his application and that he was a bona fide applicant for employment. Creswell's application was prepared by agents of CSR who elected to fax his application to Respondent on about April 26, 1996. For reasons unknown, Creswell's application was not received by Respondent. Therefore, having never actually received Creswell's application, Respondent could not have considered him for employment. I would find and conclude that Creswell was not considered for hire by Respondent because his application was not received and not for any unlawfully discriminatory

[52] I have credited the testimony of union member Michael Starnes, who said that Respondent's receptionist told him that applications were considered active for 6 months and placed on inactive status thereafter for 1 year. Kereszturi testified to submitting only one application to Respondent. I, therefore, conclude that he was considered for employment by dint of his October 9, 1995 application.

[53] By hiring Kereszturi, a union employee and clearly the leader of the Sheet Metal Union's organizational effort, Respondent, in my view, vitiates its argument that the alleged discriminatees were not bona fide applicants for employment, simply because they were employed by the Union and were bent on organizing Respondent's workers.

[54] As to Creswell, all dates refer to 1996.

[55] G.C. Exh. 2(b).

reason cognizable under the Act. I would dismiss the complaint as it relates to Creswell.

*D. The Contentions of the Parties*

1. The General Counsel's and the Charging Parties' positions regarding the nonhiring of the IBEW and Sheet Metal Union applicants during the relevant period

The General Counsel (and the Charging Parties) readily acknowledge that these consolidated matters represent "salting" and involves "two clear, open and provocative attempts to organize Respondent's various groups of employees [and that] both the IBEW and the Sheet Metal group of applicants were quite open (even brash) in their submission of applications to Respondent."[56] However, the General Counsel contends, along with this objective, the applicants also wanted in good faith to be hired for jobs with the Company. The General Counsel concedes that several and probably most of the alleged discriminatees were either full-time union agents and/or individuals then in the employ of the Unions who were paid to assist in the Unions' organizational efforts during the period in question. However, even given the dual objective by the union applicants, the General Counsel contends this would not be a legally sufficient reason not to hire or consider them for hire, citing *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), which held that a worker may be an "employee" within the meaning of that term of the Act, even while paid by the union to help the union organize the Company. Consequently, he argues, the alleged discriminatees herein should be accorded all of the protections of the Act against unlawful discrimination accorded other applicants.[57] The General Counsel further argues that the Respondent should not be permitted to discriminate against paid organizer applicants, nor should these alleged discriminatees be considered non-bona fide applicants to employment on this ground. Furthermore, irrespective of some of the alleged discriminatees' employment with the Unions in question (some were also in fact employed by private contractors), that fact should not make them non-bona fide applicants without a showing that they intended to harm the Company or not perform the employer's work or be disloyal in other ways. The General Counsel submits that the evidence of record demonstrates a compelling case for violations of the Act by Respondent by virtue of the unusually provocative nature of the Union's organizational efforts and the Respondent's failure to contact, much less interview or hire most of the alleged discriminatees. In spite of Respondent's claim of no antiunion animus or policies and its hiring of persons with known (and unknown) union affiliation during the period in question, the General Counsel strongly contends that the possible hiring of these aggressive union adherents posed an especial and unprecedented threat to Respondent and the way it conducted its business. Thus, because of what the General Counsel describes as a "serious organizational effort" by the Unions, Respondent's decision to not hire or even consider for hire the alleged discriminatees herein was unlawfully predicated on their union affiliation and involvement generally, and specifically because of their clear and aggressive intent to organize Respondent's workers, something the Company has been able to avoid for 100 years. The General Counsel submits and argues that all the reasons advanced by Respondent for not hiring these individuals are irrelevant. He argues that Respondent never intended to hire them at all because of their union affiliation and their obvious and aggressive concerted (organizing) activities, suggesting thus that the reasons advanced by Respondent for not hiring the alleged discriminatees were pretextual.

2. The Respondent's position regarding the nonhiring of the IBEW and Sheet Metal Union applicants

Respondent's denies that it violated the Act in anyway with respect to the instant charge of discriminatory nonhiring of the alleged discriminatees, principally on grounds that it merely followed its usual policies, practices, and procedures in processing the applications actually received by the Company. In essence, Respondent contends that its hiring agent treated the union applications the same as all applications received during the period in question.

Respondent argues that it legitimately employs a criteria for eligibility for employment, often described as a process of elimination, to reach a suitable employee match for the Company, and that these policies, practices and procedures were in place prior to the time the alleged discriminatees made their applications.

The criteria in effect and utilized by Hunt included the following business-related economic factors:

1. Availability of the position.
2. The qualification of the applicant for the position.
3. Comparison of budgeted wages with the current or desired wages of the applicant.[58]
4. The interest of the employee in long-term employment (with the Company) as opposed to temporary work for a short period.
5. Whether the applicant checked on his application.
6. Whether the person was licensed in his trade or field.
7. Distance between the applicant's residence and the jobsite and his willingness or ability to travel to the jobsite.

Respondent argues that Hunt, by a self-described process of elimination, considered and selected persons for interviews and possible employment with the Company because they matched her criteria. Regarding the employment criteria, I note that Respondent/Hunt did not indicate whether any specific criterion was weighted or scored higher or lower than another, or how or whether a negative conclusion on one would affect the applicants' eligibility for employment. Thus, I assume that Hunt was at liberty to apply the criteria to emphasize or deemphasize one element or the other as she saw fit.

Respondent asserts that it harbors no antiunion animus and that the General Counsel failed to establish this crucial element. As proof, Respondent cites its attempted and actual hiring of six known union members, including IBEW and Sheet Metal

[56] G.C. Br. 11.

[57] I concur with the General Counsel as to the application of *Town & Country* to cases such as the instant case. Clearly, the Supreme Court has decided paid union member/employees are entitled to the protection of the Act and may not be discriminated against in terms of hire for this reason alone. Moreover, their paid status with the Union alone cannot make them nonbona fide applicants for employment. Of course, it has been long recognized that applicants are "employees" within the meaning of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

[58] The Respondent produced the J. O. Mory job grade and structure for the period covering calendar years 1994 and 1995–1996 in R. Exhs. A and B.

union members, just prior to and during the period when the IBEW made its applications in July 1994.[59]

Respondent contends that its lack of antiunion animus is also demonstrated by its having treated union applicants better (percentage/numerically) than nonunion applicants. For instance, during the Summer of 1994, it received applications from 13 known union members (of 150–200 total applications) and hired or attempted to hire six of these, resulting in a 46-percent hire rate. For the period covering October 1995 through November 1996, Respondent contends it received six union applications (the Sheet Metal Union alleged discriminatees) and hired one, interviewed two, and attempted to interview two others for possible hire. Thus, five of the six or 83 percent of the union applicants were considered for hire. Nonunion applicants did not fare as well in either period respectively.

Respondent further contends that it did not unlawfully refuse to hire or otherwise discriminate against the alleged discriminatees, because it applied its criteria equally to union and nonunion applicants alike. As to the latter, it cites the examples of five persons with no known union affiliation[60] not hired by the Respondent because their past or present wages were greater than Respondent's. Respondent asserts that Hunt was merely following this established policy when she rejected the alleged discriminatees here.

Respondent also noted that only on rare occasions did it utilize the services of referral services to employ persons in certain skilled positions (electricians, plumbing, and carpenters), because of costs (hefty referral fees), and when it needed workers only on a temporary basis.

Finally, Respondent contends that irrespective of the validity of the hiring policies, practices and procedures, and the propriety of Hunt's application and implementation thereof, the alleged discriminatees were not in its view bona fide applicants for employment. Respondent argues that the individuals were not honestly and in good faith seeking to become employees of J. O. Mory. Rather, by design, they were *solely* trying to organize Respondent's workers, and the batched applications by union members clearly wearing union insignia were part of a plan to "entrap" Respondent into committing unfair labor practices.

In sum, Respondent contends that its decision not to hire certain alleged discriminatee applicants was based on legitimate business reasons and, second, the applicants were not bona fide applicants to employment.

[59] These individuals were:

1. Pat Garrett, member of Plumbers and Pipefitters Union Local 166, hired by Respondent on May 18, 1994.
2. Pedro Mardini, member of Sheet Metal Union (Local 20), hired on May 18, 1994.
3. Mark Leipold, member of Sheet Metal Union (local unstated), hired on July 26, 1994;
4. Paul Sauers, member of Plumbers and Pipefitters Union (local not stated), hired on July 20, 1994.
5. Ronald Swangin, member of Sheet Metal Union (Local 20), hired in late August 1994.
6. Phillip Dirig, known member of the IBEW whom Hunt attempted to interview on July 15, 1994; Dirig refused employment because he was already employed.

[60] These persons were Mel Nix, Bradley Hunter, John Fosnaugh, Douglas Dirig, and Michael Pearson, whose applications were received at various times during the period July 1994 through March 1, 1995.

### *E. Legal Analysis and Discussion*

#### 1. The *Wright Line* analysis

Preliminary to determining whether an employer has discriminated against employees in violation of Section 8(a)(3) or Section 8(a)(1) of the Act, the National Labor Relations Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected (organizing) activity of the employees was a "motivating factor" in the employer's decision either to not hire them or not even to consider them at all for employment. Once it is established, the burden shifts to the employer to demonstrate that the nonhiring would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *B E & K Construction Co.*, 321 NLRB 561 (1996).

An alleged discrimination in refusing to consider applicants for hire, as with refusing to hire them, is discrimination in regard to hire within the ambit of Section 8(a)(3). In a discrimination case, a prima facie case is made out when the evidence shows that:

1. The employer is covered by the Act.
2. The employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees.
3. That antiunion animus contributed to the decision not to consider, interview, or hire an applicant.
4. That the applicant was a bona fide applicant.

*NLRB v. Ultrasystems Western Constructors,* 18 F.3d 251, 256 (4th Cir. 1994), enfg. in part, denying enforcement in part, and remanding *Ultrasystems Western Constructors,* 310 NLRB 545 (1993), quoted in the *Ultrasystems Western Constructors* [II], 316 NLRB 1243 (1995); *3E Co.*, 322 NLRB 1058 (1997).

In the instant case, Respondent has admitted coverage under the Act. It is also abundantly clear on this record that during the relevant period, Respondent was hiring or, at the very least, had concrete (though not without some variance) plans to hire employees for electrician, sheet metal, and HVAC positions at its several facilities during the period in question. The record also clearly evinces Respondent's knowledge that the IBEW Unions and Sheet Metal Unions were making and submitting applications for employment in response to these concrete hiring efforts and that because of the nature of the submissions thereof (batched by the IBEW) and (as a group with prominent displays of union insignia by the Sheet Metal Union), the Respondent was put on notice of the organizational (in part) nature of these applications. This point of Respondent's knowledge of the protected activity of the Unions herein need not be belabored. I also would conclude that in spite of their organizational motives, or their being employed by the Unions or others, the alleged discriminatees' qualifications for the position to which they applied and their intention to accept employment with the Respondent, for the most part are not seriously in dispute.

Hunt was directly asked by Respondent's counsel about her (and ergo, the Respondent's) policies and/or views of unions and unionism. Hunt responded that during her tenure as personnel director at J. O. Mory, as a policy, she never set aside union applications and always gave them the same consideration as other applications. Hunt was not aware of any other persons knowingly setting aside union applications. She also

was not aware of any policy or policies that had ever existed at J. O. Mory whereby union individuals would be given different consideration than all other applicants.

The General Counsel also incidentally elicited Hunt's views on unions at J. O. Mory in the context of the hiring of alleged discriminatee Tafelski. Hunt said that Tafelski (sarcastically, and perhaps provocatively) asked her at his interview if the fact that he was a union organizer bothered her. Hunt's response to Tafelski was: "I finished by completing that, no, his union affiliation did not make a difference to me but that my job was to find the best match for the position that I was looking for and part of that is for full-time work with J. O. Mory's." (Tr. 365.)

As discussed earlier herein, Respondent further asserts its lack of any bias against or hostility toward unions or the particular union applicants here by proof of its having hired other known union members both before and during the relevant period, and its demonstration of union applicants having received *per capita* better treatment than nonunion applicants. However, Respondent's arguments notwithstanding, I find that it did not have a neutral attitude about unions. In fact, the clear preference of J. O. Mory was not to have unions and union contracts in place at its facilities for business and economic reasons. The view was held by several of Respondent's management employees. For instance, Gary Worman, employed at J. O. Mory for 13-1/2 years, and currently its operations manager at the Avilla sheet metal division and a former United Auto Workers union member, testified at the hearing. Worman was involved in the hiring process at J. O. Mory (he sat in on interviews), but claimed that he had no say in whether the persons were hired or not. On cross-examination by the General Counsel, Worman was asked, among other things, his views on unions operating under contract at J. O. Mory. Worman responded, "My personal opinion, I would rather not see a union . . . . Because of our diversification." In response to another question by the General Counsel going to the point of whether the existence of a union contract (at J. O. Mory) placed limitations on the Company's employees, Worman responded: "I think it [a union contract] would be more limited on how we [J. O. Mory] could deal with *our customers* [emphasis added]."

By way of followup, I asked Worman about his views on not wanting to have unions at J. O. Mory because of the Company's diversification, the effect of unions on the customers and what he specifically meant by this. Worman in the following exchange with me testified as follows regarding the issue of diversification:

> THE WITNESS: We have a lot of our employees that are skilled in multiple trades that when a customer calls, in many cases, we can send a person that can do several different trades and are [sic] licensed in several different trades. We can better service that customer by sending one person instead of three or four.
>
> JUDGE SHAMWELL: I see. So, in other words, just to understand, that if you were to get a job proposal that called for, I guess, different types of trade, trade work, your people are trained to do a number of those things and one person or lesser number could do it. But if you had a union, then you would have to send out a trades person for each category called for on the job.
>
> THE WITNESS: I believe that's the way the union works, yes.
>
> JUDGE SHAMWELL: That's your opinion.
>
> THE WITNESS: Yes. [Tr. 278.]

Thus, as I understood Worman's testimony, the existence of unions and union contracts in particular would bring certain economic disadvantages to the Company in the form of less speedy and less efficient service to its customers.[61]

Harold Wasson, one of the alleged IBEW union discriminatees, testified that during August 1994 while checking on the status of his application, he spoke with Respondent's vice president, Michael Rowe. They discussed his application and also talked in generalities about the Company and its operations. Wasson, first having introduced himself as the business agent for the IBEW Union, asked Rowe if J. O. Mory had ever considered "going union." Rowe, according to Wasson, said that he (Rowe) thought that with the way J. O. Mory was structured, that it (a union shop) would not work out, just the way they (Respondent) handled their manpower. Michael Rowe was present at the hearing. However, Respondent did not call Rowe to rebut Wasson's testimony in spite of Rowe's being readily available.[62] Consequently, Wasson's version of the conversation with Rowe is unrebutted. Thus, I would credit this part of Wasson's testimony on the issue of Respondent's views on unions.

Since Hunt routinely consulted with various Company supervisors and foremen to ascertain whether a position was available and sought their views on the "fit" of the applicant for the position,[63] I would conclude that at the very least, she was aware of the attitude of Respondent's higher-ups and operations managers regarding unions at J. O. Mory as she considered various individuals for employment at the Company.

Thus, although Hunt denied in effect any particular hostility to unions and may herself be free of such antipathy, it is nonetheless clear to me that the corporate view of unions at the Company was negative, if not overtly hostile; and that this negative view in all likelihood permeated all levels of the Company's hierarchy, including and especially the personnel level. While Hunt was not a policymaker regarding hiring, she certainly was the interpreter and implementor of such policies. Hunt, in my view, must have been aware of the attitude and feelings of the Respondent's supervisors and managers because

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[61] Worman provided the following example of the problem unions presented to the Company:

> THE WITNESS: I am trying to think of a good example here. If we have, say, a customer call and he has got a machine broke down, he doesn't know why that machine is broken down. Do we send an electrician, a millwright, a mechanic? What do we send because the way I understand the union works, you would have to send an electrician, a mechanic or whatever until you found out what the problem with the machine if the customer didn't know.
>
> We have employees that can go out and trouble shoot the mechanical, the electrical, the hydraulics, whatever.
>
> JUDGE SHAMWELL: And if you had to give
>
> . . . .
>
> THE WITNESS: Speedier service. [Tr. 279.]

[62] Rowe's presence at the hearing during the taking of Wasson's testimony caused something of a stir, because I had invoked the witness sequestration rule before any testimony was taken. Fortunately, at the time of my discovery of his presence and because little else other than Wasson's testimony related to him, I was not required to impose any sanctions. However, because of the issue, I noted that Rowe was available on each day of the hearing.

[63] Respondent called Edward Harpel, a company shop supervisor at its Avilla facility for the past year and before that a shop foreman. Confirming Hunt's testimony, Harpel testified that while Tammy (Hunt) does the hiring, he has some say in hiring at J. O. Mory with regard to people hired for the Avilla facility. (Tr. 258–259.)

she regularly consulted with them as part of her job; and it seems from my personal observation of Worman, who unabashedly stated his views, this attitude was far from a company secret.

Given that J. O. Mory did not prefer to have unions and union contracts, this, in and of itself, does not establish necessarily an antiunion animus. In fact, Respondent has the right to work nonunion as long as it does not discriminate in its hiring practices. *Wireways, Inc.*, 309 NLRB 245 (1992). Clearly, it must be proven that the Company acted on antiunion feeling or attitude in failing to hire or consider for hire the union adherents. *Wright Line,* supra. The Respondent's (discriminatory) motive, therefore, is determinative and is a precondition to finding a violation of Section 8(a)(3). *The 3E Co.*, 322 NLRB 1058 (1997).

As is often the case in many *Wright Line* cases, animus is difficult to establish. Circumstantial evidence, according to Board law, may be relied on to infer discriminatory motivation on the part of the employer. Thus, the trier of fact may look at all of the surrounding circumstances, including the timing of the employer's conduct,[64] whether the employer has selectively enforced its existing or newly created policies;[65] the employer's disparate treatment of employees;[66] the employer's failure to investigate incidents on which the employer relied;[67] and shifting employer explanations of policies[68] to prove animus.

Aside from the animus issue, Respondent contends that the General Counsel cannot establish a prima facie unfair labor charge in a *refusal to hire case* by proving that there were merely some job vacancies applied for by union organizers and that an employer harbored animus against union applicants, citing *NLRB v. Fluor Daniel, Inc*., 102 F.3d 818 (6th Cir. 1996).

In *Fluor Daniel*, the Sixth Circuit stated that:

> It cannot be an unfair labor practice merely for an employer to harbor animus against union members applying for jobs that do not exist or have already been filled, or for which they are not qualified. If such conduct were an unfair labor practice, then the mere entertainment and expression of anti-union animus would constitute an unfair labor practice. Indeed, this is the NLRB's position . . . . Such a holding does not comport with the requirements of Section 8(a)(1) and (3) of the Act. There is no interference with, restraint, or coercion of applicants in the exercise of their protected rights when an employer, even with anti-union animus, rejects applicants who are in fact unqualified or for whose particular services the employer simply has no need. Therefore, no violation of Section 8(a)(1) exists in these circumstances. Similarly, there is no "discrimination *in regard to hire*" in this situation in violation of Section 8(a)(3). Refusal to consider an applicant out of improper motive, without more, is not a violation of Section 8(a)(1) or (3) of the Act. [Id. 832–833.]

Thus, Respondent argues that even if *animus* against the union applicants here was proven, the General Counsel, nonetheless, must show that there were certain jobs available for them, not merely the existence of *some* jobs; the General Counsel must, in essence, match a qualified applicant with an available position in order to make out a prima facie case in a hiring case. *Fluor Daniel* at 833.

I would distinguish *Fluor Daniel* and find that the holding there is not applicable here. First, as the Sixth Circuit acknowledged, its reasoning possibly conflicts with the established and Board-sanctioned *Wright Line* approach to 8(a)(1) and (3) issues. Second, the facts of *Fluor Daniel* are inapposite to those of the present case. Notably, in the instant case, while the numbers of actual positions available is not precisely known, it is clear on the record that in certain relevant categories, positions *were* definitely and readily available and that Respondent, by its own statements and actions, clearly needed to fill them. The credible evidence indicates that at various times, the Respondent was swamped with work. Also, there is a little or no dispute as to the qualifications of the IBEW and Sheet Metal applicants for these jobs. Third (and probably most importantly), Respondent here has been allowed to present proof to support its affirmative defenses in the *unfair labor* practice stage of the proceedings. This is in direct contrast to the factual circumstances of *Fluor Daniel*, where it was not clearly established that there were positions actually available for 43 voluntary union organizer applicants and, moreover, the Company was not allowed to present its defense until the *compliance stage of the proceedings*. These elements are simply not present in the instant case. Moreover, by creating an additional element requiring a showing that certain jobs were available in a refusal to hire case by the General Counsel, *Fluor Daniel* seems to make an unwarranted departure from established Board law and procedure in the refusal to hire area. Accordingly, I decline to follow and apply it to the instant matter.[69]

2. The defenses of the Respondent

If the General Counsel makes its prima facie case, the Respondent must affirmatively prove that the nonhiring of the

[64] *Farm Fresh*, 301 NLRB 907 (1991); *Kellwood Co.*, 299 NLRB 1026 (1990).

[65] *ABF Freight System*, 304 NLRB 585 (1991), enfd. sub nom. *Miera v. NLRB*, 982 F.2d 441 (10th Cir. 1992), affd. 145 LRRM 2257 (1996).

[66] *In-Terminal Services Corp*., 309 NLRB 23 (1992*); Harsco Corp.*, 304 NLRB 729 (1991).

[67] *Estes Nursing Facility-Oak Knoll,* 301 NLRB 659 (1991).

[68] *Associated Services for the Blind*, 299 NLRB 1150 (1990).

[69] In a recent case, *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 26 (1997), the Sixth Circuit reiterated its holding in *Fluor Daniel* and stated that in a refusal to hire case, the General Counsel's prima facie case consists of proving:

(1) that the employer is covered by the Act; (2) that the applicant is covered by the Act; (3) that the applicant actually applied for a job and was qualified for a job for which the employer is seeking applicants; (4) despite his qualifications the applicant was not hired; (5) anti-union animus contributed to the decision not to hire an applicant; and (6*) after his rejection, the position remained open and the employer continued to seek applications from persons with the applicant's qualifications.* [Id. at 4.] [Emphasis added.]

The court in *Architectural Glass* at. 4 (as it did in *Fluor Daniel*) defended its newly articulated prima facie test against claims of conflict with *Wright Line*, by noting that it (the new prima facie test) only applied in cases involving hiring, not discharge or other discrimination in other terms or conditions of employment against those already holding a position. The Court went on to note that after the General Counsel has established a prima facie case of union-based discrimination, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the employer's rejection of the applicant. Again, I would distinguish *Architectural Glass* factually from those of the instant case. Additionally, this newly minted text departs virtually from established Board law, and I decline to follow it.

alleged discriminatees would have taken place even in the absence of protected activity.

Assuming arguendo, that the General Counsel has made out a prima facie case, Respondent asserts that it had no discriminatory motive in not hiring the union members here.

Respondent maintains that it merely followed its normal and ordinary business procedures, employed and implemented its hiring criteria as to *all* applications received by it (union and nonunion) and made appropriate hiring decisions. Respondent contends that pursuant to its hiring policies, operating as a process of elimination, persons were considered or not considered for interviews; some were attempted to be called for interviews and some applicants were reached, others were not; some applicants agreed to be employed, others declined. This was the hiring process at work. As a consequence, some union applicants, including some of the alleged discriminatees, were considered for hire or attempted to be hired or were actually hired, and some of the alleged discriminatees were not considered for hire.

Respondent contends that neither the union status of the alleged discriminatees nor their obvious organizational activities, to wit, "salting,"[70] were the motivating or even contributing factors in its decision not to hire them.

Clearly, the linchpin of Respondent's defense is the validity of its employment criteria and Respondent's good faith and nondiscriminatory application thereof. I would concede that Respondent's employment criteria seems facially valid, and is reasonably and plausibly connected to its legitimate business or economic reasons and concerns.

This said, if Respondent demonstrates that these policies and practices (along with the other elements of the criteria) were validly and honestly employed by Hunt as she considered the applicants; that these policies and practices, etc., were not mere pretexts employed to discriminate, then the Respondent has met its burden under *Wright Line*.

### *F. Discussion and Conclusions Regarding the Remaining Alleged Discriminatees*

#### 1. The IBEW alleged discriminatees

As previously discussed in the IBEW individual cases section of this decision, Respondent variously offered several and differing reasons for not hiring the individual union members Closson, Adams, T. Geary, M. Geary, Clayton, McCann, and Wasson. However, the critical and perhaps guiding criterion utilized by Hunt in not hiring them was the wage criterion. Hunt, in rejecting these persons for hire, determined that each one was either currently earning or in past jobs had earned substantially more than Respondent budgeted for the advertised positions. She concluded primarily and essentially on this ground that these seven would not make a good match for employment at J. O. Mory.

It is noteworthy that Hunt never attempted to contact the IBEW seven to discuss/investigate the issue of wages or other aspects of their application, including the Company's change of hiring policy, their qualifications (their licensure or journeyman's status), their experience or other relevant background matters. Hunt also did not, in my view, give much, if any, consideration to the applicants' rechecking on the status of their applications, a criterion on which she seemed to place great emphasis in her testimony. However, it is not the place of the trier of fact to second guess Respondent or its agents in the creation, interpretation and implementation of its legitimate business activities, including its hiring policies and practices. Also, it is not my place to criticize or evaluate Respondent or its agents in the performance of their jobs. However, it is clearly with the purview of the trier of fact to determine in a refusal to hire case whether Respondent and its agents have unlawfully and discriminatorily applied even colorably legitimate policies or have performed their jobs in such a way as to deny rights guaranteed under the Act. Thus, generally, all policies, rules and practices must be applied in a nondiscriminatory fashion and must be promulgated for nondiscriminatory reasons.

I have carefully examined the entire record herein, but with particular attention to all of the applications of record of the various union and nonunion seekers of employment with J. O. Mory during the relevant period to determine if Respondent's rejection for hire of the remaining seven IBEW applicants was unlawfully discriminatory or based on a fair and equitable application of Respondent's criteria. As I have noted earlier herein, the critical issue here in my view is whether Respondent failed to hire these union adherents out of an antiunion animus per *Wright Line,* supra.

I have concluded that Respondent did violate the Act in not hiring applicants comprising the IBEW group because of Respondent's discriminatory and disparate treatment of the IBEW seven. I would find and conclude that the reasons given by Respondent for not hiring them were essentially pretextual in nature.

Preliminarily, I agree with the General Counsel's characterization of this case as being one in which both Unions had in part set out very aggressively to organize Respondent's operations. Thus, especially during the summer and fall of 1994 in particular, Respondent was especially on the alert for union organizational attempts, and being of a mind that the presence of a union would be disruptive of the way it preferred to conduct its business, girded its loins to frustrate and defeat the IBEW's efforts. It is clear on this record that Respondent's wage criterion—the policy against hiring persons who were then employed and/or making wages substantially higher than Respondent paid—was principally employed pretextually to reject the IBEW alleged discriminatees.

I have come to this conclusion by examining the contemporaneously submitted application of a union affiliated electrician, Phillip Dirig, and comparing the way he was treated by Respondent with the treatment of the Closson IBEW group. According to his application, Phillip Dirig applied to Respondent for an electrician's position on July 18, 1994. Dirig indicated on his application that he could start work immediately, that he was "open" (to negotiation) regarding salary desired, but *he*

[70] Respondent argues that the Unions here employed a "*modus operandi*" designed to invite rejection of union applicants by Respondent and to entrap it into committing an unfair labor practice. I take this "*modus operandi*" to refer to the salting technique, clearly employed here. The Board has not ruled that this technique is unlawful; Respondent points to no authorities invalidating salting. I have reviewed the decision (unpublished) of *Goodless Electric Co.*, JD–22–95, March 2, 1995, cited by Respondent presumably in support of its position on the salting issue. In *Goodless,* (retired) Administrative Law Judge William F. Jacobs determined that the union applicants under the facts and circumstances of that case were not bona fide applicants. However, his ruling was not predicated on the organizational activities of the applicants, but because they were basically incompetent for work or unqualified for the jobs they sought. Salting was not the issue.

*was currently employed*, so Respondent could not make inquiry of his present employer. Dirig indicated that he had completed the (union) Joint Apprenticeship Training Committee (JATC), but had not partaken of any special studies and held no license. Dirig, at the time of his application, was working for a union contractor (Shambaugh) and making union scale as a journeyman inside wireman. Dirig's stated reason for wanting to leave his present job was *to make more money* (highly unlikely under Respondent's wage structure). Dirig's employment history clearly indicated that he was used to making union scale on all prior jobs listed. It is undisputed that union scale wages were substantially higher than Respondent's wages.

Hunt testified that she received Dirig's application and knew that he was affiliated with a union by his reference to the JATC, and because he was employed at a known union contractor, Shambaugh Electric. Hunt contacted Dirig on July 25, 1994, about employment with the Company but did not hire him, because Dirig advised her that he was already working. Clearly, Hunt would have hired Dirig if he were not already employed, and Respondent admits as much. The question begging for an answer is what makes Dirig, employed at the time of his application, used to making more money then Respondent claims it budgeted for the position, holding a journeyman's card (but unlicensed) and clearly a known union member, a worthy candidate for employment at J. O. Mory while at the same time the Closson IBEW group (with similar and even superior qualifications individually) unsuitable for employment. The obvious answer to me is that the Closson IBEW group clearly showed its organizers' hand; they were out in part to organize the Company. Dirig presented no such obvious threat. Thus, Dirig gets a favorable nod; the Closson group is rejected. In this light, I would conclude that Hunt decided not to hire the Closson IBEW group not for the reasons she stated, but because of their union affiliation and their clear attempt to engage in protected activity—organizing the J. O. Mory employees. Accordingly, while legitimate on their face, I would conclude that with respect to the IBEW group, Hunt's stated reasons were really pretexts, mere disguises for her real and unlawful motive to frustrate the organization of J. O. Mory's employees by the Closson adherents.

In so finding a violation, I am not unmindful that Respondent utilized its wage criterion to reject certain other applicants, namely, Michael Pearson, Mel Nix, Bradley Hunt, John Fosnaugh, and Douglas Dirig during the months the Closson group made its applications. Significantly, however, Hunt testified that she did not know from their applications or otherwise, whether these individuals were affiliated with any unions.

I am also aware that Respondent hired other persons known to be union members during the spring and summer (July 1994), namely, Pat Garrett, Pedro Mardini, Mark Leipold, Paul Sauers, and Ronald Swangin, which would serve to counter a claim of union *animus*. However, I note that Garrett, Mardini, and Leipold, at the time of their applications and ultimate hiring, did not reveal to Respondent their organizational intentions or objectives.

Sauers and Swangin were hired and evidently engaged in no organizational or other concerted activities. In fact, Swangin's application indicated that he had left one of his former jobs, because he was "tired of working for [the] Union," an attitude clearly compatible with Respondent's. Thus, on the record, these afore-mentioned union members did not present to Respondent the same "in-your-face" organizing threat as did the IBEW group.

2. The remaining Sheet Metal Union alleged discriminatee:

*Kelly Ullery*

Ullery testified that he had been a member of the Sheet Metal Union for approximately 5 years and is a fourth year apprentice; in October 1995, he was in his third year of apprenticeship.

Ullery became aware of Respondent's hiring through local newspapers and submitted an application[71] in person at Respondent's South Milford facility. At the time of his application, he was in the company of fellow union members Tafelski, Anspaugh, two Fort Wayne apprentices whose names he could not remember[72] and Kereszturi, all of whom were prominently wearing various union paraphernalia. Ullery was wearing a baseball cap with the Union's insignia on it. Ullery at the time was employed by the Sheet Metal Union (and continues in its employ, position unknown).

Ullery submitted his application to the receptionist and was told by her that Hunt was responsible for hiring. After submitting his application, Ullery called Respondent's South Milford office to check on his application on a once-per-day basis for approximately 1 week, but was never able to contact Hunt. Ullery was told on those occasions that Hunt was out of the office, and he left messages for her to return his call. To his knowledge, Ullery was never contacted by the Respondent regarding his application.

Hunt explained why Ullery was not offered an employment opportunity at the Company. First, the positions as advertised were not actually filled by the Respondent[73] although she had indeed interviewed other persons for the position. Second, Hunt stated that Ullery was currently then employed (by the Union). Third, Ullery was from the South Bend area which in her view (geographically) would not make him a good match, considering where the Company did most of its work. And, fourth, the advertised position was for a residential installer and, *based on Ullery's application,* his experience appeared to be in commercial installation. On this point, Hunt went on to explain that one's experience in one area or the other of a trade was important to the Company in terms of costs primarily in the area of training, which in turn impacts on the specific job in question.[74] Regarding the jobs for which employees were being sought, Hunt explained that the Company was looking for "lead people" who would be able to run the job with (presumably) no or the least amount of additional training. Although Hunt did not personally interview Ullery, she was asked the

[71] Ullery's application is G.C. Exh. 20.

[72] Presumably, Starnes and Till.

[73] Hunt's reasons for the nonfilling of these positions at this time—October 1995—have been discussed earlier, infra.

[74] Ambrose Dean Polly, Respondent's division manager at its Fort Wayne facility, testified at length on the substantial differences between commercial and residential sheet metal installation and related work. Respondent's Fort Wayne facility does primarily residential work. Gary Worman, Respondent's operations manager at the Avilla sheet metal division, also testified to material differences in commercial and residential sheet metal installation. The testimony of these two persons in this area was unrebutted. Accordingly, I would conclude that commercial sheet metal experience is not clearly fungible with residential sheet metal experience (and vice versa) and that Hunt could reasonably consider the lack of residential sheet metal experience as a disqualifying criterion for purposes of hiring.

following question by Respondent's counsel (Tr. 343) regarding Ullery and alleged discriminatee Tafelski:[75]

> Q. Did Mr. Tafelski and Mr. Ullery, did they have any experience in residential based on the applications of both of them and the interview that you had with Mr. Tafelski?

Hunt responded:

> Based on the interview that I had, he had electrical wiring which would be residential but most of his sheet metal work would have been in commercial work.

Respondent's counsel asked Hunt a followup question:

> And did that play any decision or would it have played any decision in whether you would have hired him or not or considered hiring him?

Hunt responded, "Yes sir, it would have."

Again, although not entirely clear to me, Hunt seemed to be speaking only of *Tafelski* and not Ullery. Thus, as to Ullery's residential experience or lack of it and its bearing on her decision not to hire him, Hunt did not clearly and responsively address the issue in her testimony.

I have examined carefully Ullery's application (G.C. Exh. 20) on which he lists three former employers and corresponding positions of "fabricator—one position, and "installer"—two positions. The application is devoid of *any* reference to the nature of the work called for by these positions. Furthermore, there is nothing in the application, or the record as a whole, which would identify Ullery's prior work as residential or commercial; or that the employers listed by Ullery were "residential" or "commercial" concerns. Therefore, I would conclude that Hunt was mistaken in determining that Ullery did not have residential sheet metal experience. Hunt also rejected Ullery at least in part because she felt that his residence in South Bend made him a poor match geographically for employment with the Company. Ullery was not interviewed and, of course, was not asked about his willingness (or ability) to travel to a remote site, as were the other interviewed applicants. Considering that commuting (even substantial distances) is a fact of the modern workaday world (and this may be the rule in the construction industry), Hunt may not be on solid ground in assuming that an individual seeking employment will not accommodate himself to a required commute. However, I will not second guess Hunt on this point.

Hunt also cited as a reason for not hiring Ullery, the Company's decision not to fill the advertised positions in October 1995. However, I note that Hunt re-called other Sheet Metal union members in February and March 1996 when the Company's business improved, and it is particularly noteworthy that Kereszturi was later re-called and hired in November 1996, in spite of his experience being primarily in commercial sheet metal. Finally, Hunt considered Ullery's then-current employment as a reason to disqualify him for employment. Hunt knew, of course, that Ullery was a Sheet Metal Union employee.

Hunt's handling of Ullery's application, which appears to conform generally with the Respondent's employment criteria, except for the wage criterion, is flawed. However, Hunt clearly, in my view, made her decision to reject Ullery on mistaken belief or erroneous information. Moreover, she took no steps to investigate or verify the matters on which she evidently placed great reliance in rejecting Ullery.

In spite of what I see as a basically flawed handling of Ullery's application by Hunt, I cannot glean from her treatment of him a discriminatory motive. Clearly, she was of a mind over a period of time to hire most of the members of the Sheet Metal applicants, and actually took steps to hire them. It cannot be denied that five of the six Sheet Metal applicants were honestly considered for employment and one of whom, the prime mover of the organizing effort, was actually hired by Respondent. I cannot, based on the facts and circumstances surrounding his application, conclude that Ullery was not hired by Hunt because of unlawful discrimination. Accordingly, I would dismiss the complaint as to him.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.
3. By refusing to consider for employment and/or refusing to hire the following IBEW members named in the complaint (Case 25–CA–23625),

1. Michael Closson
2. Harley Adams
3. Timothy Geary
4. Michael Geary
5. Roger Clayton
6. Russell McCann
7. Harold Wasson

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider the above applicants for employment, I shall order Respondent to consider them for hire and to make whole those discriminatees, whom the Respondent would have hired, for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which Respondent subsequently would have assigned them. If it is shown at the compliance stage of this proceeding that the Respondent, but for the discrimination, would have assigned any of these discriminatees to present jobs, the Respondent shall hire those individuals and place them in positions substantially equivalent to those for which they applied. *3E Co.*, 322 NLRB 1058 (1997). Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[75] The matter of residential versus commercial experience as an employment criterion was also at issue in the case of alleged discriminatee Tafelski.